

Waterway and Wetland Handbook

CHAPTER 75

PIERS

GUIDANCE PURPOSE AND DISCLAIMER

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PURPOSE

Regulating the placement and length of piers

A riparian owner has the right to place a pier, wharf or other similar structure in aid of navigation. This right is subordinate to the public right of navigation, and the rights of the state as trustee of the navigable water of Wisconsin. The pier statutes and administrative rule are designed to clarify the right of riparians to reasonable access and use of public water, while guaranteeing that public rights will not be abridged.

MECHANISM

A riparian owner may place a pier which meets applicable statutory and administrative rule standards without a permit. If the Department or any other citizen feels that any pier obstructs navigation, they may commence a civil action under s. 30.15, Wis. Stats., to seek abatement. Alternatively, upon complaint to the Department by any citizen that any pier or wharf violates ss. 30.12 or 30.13, the Department must hold a hearing under Section 30.14 to determine the validity of the complaint.

HISTORY

Municipalities have been authorized by law to regulate docks, wharves and piers long before the state began regulating these structures. As early as the 1800s, cities were authorized by charter to regulate the construction of wharves and piers. It was not until 1933 that a state program for authorizing structures in navigable waters was enacted. A complete history of statutes authorizing state and local control over piers, wharves and docks through 1959 may be found in handbook Chapter 70, and will not be repeated here.

Chapter 441, Laws of 1959, created sections 30.13 and 30.14, Wis. Stats. These statutes incorporated language previously found in section 30.02, and added some new language. Section 30.13 stated legislatively for the first time the common law right of riparians to build a pier without a permit, provided the pier did not extend beyond an established pierhead line or interfere with public rights. This language was designed to clarify the right of riparians to build reasonable piers, while retaining state enforcement rights against unreasonably long piers, or those which interfered with navigation or other public rights.

Section 30.13 also changed the phrase "dock line" to the more modern "pierhead line," although the meaning is the same. The right to enact a pierhead ordinance was expanded to include all municipalities, not only cities. The procedure for establishing a pierhead line was declared to be the same as that for a s. 30.11 bulkhead line. The phrase "public rights in navigable waters" found at the end of s. 30.13(3) was a redraft of the previously standard "public rights" found in s. 30.02(1)(9), and was thought to more clearly express the legislative intent to protect public rights when approving a pierhead line.

Prior to the enactment of Chapter 441, it was illegal for a riparian "to extend his wharf or pier into navigable water beyond the dock line as established, if such extension materially interferes with, or obstructs navigation" (Chapter 335, Laws of 1949). In practice, the Public Service Commission was forced to determine, on a case-by-case basis, whether a particular pier which extended beyond an established dock line actually obstructed navigation. Chapter 441 changed this language to indicate that a pier could only be extended beyond an established pierhead line if a Section 30.12, Wis. Stats., permit was received.

Section 30.14 was created by Chapter 441, and is a restatement and consolidation of language previously found in ss. 30.02(1)b, c and g.

There have been no substantive changes in either Section 30.13 or 30.14 since 1959.

In 1981, the Wisconsin Supreme Court decided Nosek v. Stryker, 103 Wis. 2d 633. This case involved a dispute between two riparians over the respective location of their piers. The court reviewed various proposed rules for apportioning the riparian zone of interest, and concluded that the trial court had correctly applied the "right angle rule" (very similar to the coterminous rights theory described in two drawings in the appendix). This case affirmed that under common law rule a pier could not extend further than the line of navigation for the lake, and that each riparian was entitled to exclusive use of his riparian space for purpose of access to navigable water, provided he did not interfere with public rights. This case is the leading case in the area of riparian disputes over piers and wharves.

STANDARDS

Statutory standards administered by the Department in s. 30.13, Stats., include the following:

1. Wharves and piers may be constructed in aid of navigation without a permit provided they meet all other applicable standards found in Section 30.13, Stats.
2. Wharves and piers shall not interfere with public rights in navigable waters or with the rights of other riparian proprietors.
3. Any wharf or pier which extends beyond a lawfully established pierhead line or which otherwise fails to comply with this section constitutes an unlawful obstruction to navigation unless a permit has been obtained pursuant to Section 30.12, Wis. Stats. Pierhead lines may be established by a municipality in the interest of the preservation and protection of its harbor or the public interest using a procedure similar to that used for a bulkhead line (see Chapter 60 of the handbook).

4. If the municipality has created a board of harbor commissioners, the municipality must obtain approval of the board for any pierhead line.
5. Wharves and piers shall allow for the free movement of water underneath.
6. Wharves and piers shall not be built so as to cause the formation of land upon the bed of the water.

Section 30.14, Wis. Stats., provides that the Department must hold a hearing upon complaint of any person that any wharf, pier or structure exists in violation of either s. 30.12 or 30.13, Wis. Stats. This hearing is held before a Department of Administration examiner, who determines if the complaint is valid. This hearing should normally be held under both sections 30.14 and 30.15, since no enforcement is set forth in s. 30.14. If the examiner finds that the pier or structure is in violation, he can then order abatement pursuant to Section 30.15, Wis. Stats. Enforcement of an abatement order issued under s. 30.15 may be sought under either section 30.03, Wis. Stats., (see chapter 50 of the handbook for further details) or in a local court action where forfeitures may be assessed.

Municipal Authority to Remove Piers

A municipality may remove a pier or wharf which constitutes an unlawful obstruction of navigation in accordance with ss. 30.13(4)(c), 30.13(5), 30.16(2), 66.0495, 823.215 and 893.765, Wis. Stats. These statutes declare that piers and wharves which are dangerous or beyond reasonable repair are public nuisances, and subject to removal by municipal action.

Administrative Rules

1. NR 1.95, Wis. Adm. Code: Wetland Protection and Preservation. Establishes general standards to be applied by the Department in decisions affecting wetlands. The Department shall consider proposals which require its approval with the presumption that wetlands are not to be adversely impacted or destroyed, and that the least overall adverse environmental impact shall result.
2. NR 326, Wis. Adm. Code: Regulation of Piers in Navigable Waters. NR 326.04 includes the following standards:
 - (1) Piers shall not extend into water deeper than 3' unless necessary to allow navigation for boats in use or appropriate for use on the waterway. The depth of the water necessary for nonfixed keel sailboat draft shall be measured with the centerboard or dagger boards raised. The determination of necessary water depth shall be based on the normal summertime low levels on the waterway, or summer minimum levels where established by department order.
 - (2) Notwithstanding par. (1), piers may extend out to any legally established pierhead line.
 - (3) Solid piers.
 - (a) Solid piers may be permitted under s. 30.12, Wis. Stats., only on the following waters:
 1. Outlying waters;
 2. Harbors connected to outlying waters;
 3. The Fox River from the DePere dam to Lake Winnebago;

4. Lake Winnebago; and

5. The Mississippi River.

(b) Solid piers shall be provided with a sufficient opening to provide for the passage of littoral drift. The opening size shall be adequate to prevent the deposition of littoral drift, considering wave energy, littoral drift supply and near-shore water depths.

(4) A pier shall not totally enclose any portion of a navigable waterway.

(5) Piers shall not unreasonably obstruct navigation or otherwise interfere with public rights in navigable waters.

(6) Piers shall not interfere with the rights of other riparian proprietors.

(7) Piers shall not interrupt the free movement of water nor cause the formation of land by deposition of littoral drift upon the bed of the water.

(8) Piers associated with marinas and other similar mooring facilities shall not extend into the water from the shoreline beyond the line of navigation unless a permit is obtained under s. 30.12(2), Wis. Stats. All such marinas (those with facilities requiring a s. 30.12 permit) must be open to the public, and use of the facility by the public may be conditioned only on the payment of a reasonable mooring or anchoring fee.

Note: For example, the use of such an extended pier shall not be conditioned upon membership in a private club or organization, purchase of a parcel of property, or purchase of a boat.

(9) Piers shall not be constructed or maintained with a screen or in any other manner which would trap or accumulate aquatic plants.

3. NR 150, Wis. Adm. Code: The placement of a pier or wharf not exempt from permit requirements is a Type 3 action, not generally requiring the preparation of an environmental assessment screening worksheet (EIASW). The establishment of a pierhead line under s. 30.13, Wis. Stats., is a Type 3 action.

ADMINISTRATIVE INTERPRETATIONS

1. Solid structures cannot be built out to a pierhead line without a s. 30.12, Wis. Stats. permit (BLS opinion 4-21-70).
2. The right to place a pier is a riparian right vested in the owner of the fee title of the property. An access easement simply allows use of land without conveying the riparian right to build a pier, therefore, the holder of an access easement cannot construct a pier (BLS opinion 5-31-72).
3. An owner of an interest in riparian land (such as a condominium owner) is a riparian proprietor under Wisconsin law. In all cases, an individual check must be made of the declaration or instrument establishing unit ownership to determine if any land was conveyed along with the condominium unit itself. A person possessing less than full fee title may construct a pier if the remaining interests which would together constitute fee title are also present (e.g., a lessee of riparian land could construct a pier if the lessor agreed to such in the lease).

A riparian owner has the right to rent mooring space, provided the pier meets the requirements under s. 30.13, or is permitted under s. 30.12, Wis. Stats. (Note that there are additional requirements imposed under NR 326, Wis. Adm. Code, which became effective after this opinion was issued.)

A pier which extends beyond the point of navigability for the largest craft which will be moored at the pier may be an obstruction to navigation. (This opinion has since been codified by NR 326.) The mere fact that a pier is surrounded by other long piers does not entitle the owner to extend further into the lake than needed for his boats (BLS opinion 6-8-73).

4. A municipality must receive approval under NR 5.09(3)(b) for the ordinance establishing a designated mooring area created pursuant to s. 30.74, Wis. Stats. A s. 30.12 permit is not required by municipalities placing mooring buoys. The municipality must have a riparian interest in the land adjacent to the mooring area (BLS opinion 4-12-79).
5. Riparian rights may be sold or rented by a riparian proprietor. Any riparian owner may rent mooring buoys within the area covered by his riparian rights.

The riparian rights of backlot owners depends upon the interest they have in riparian land. Only a riparian owner has the right to place a mooring buoy or pier in front of their property. (Letter from James Kurtz to Robert Bramer on mooring buoy question, 6-5-80.)

6. A proposed program guidance on swimming, waterskiing and mooring rafts is attached. This guidance was written by George Meyer on September 8, 1981 and is the latest memo on these structures.
7. A program guidance memorandum on Chapter NR 326, Wis. Adm. Code, is attached. This guidance was proposed by George Meyer on 10-14-81 and is the latest memo on this administrative rule.

PROCESS

A. Application

If a pier or wharf meets the criteria set forth in s. 30.13, Wis. Stats., no permit is required and no application is filed. If the applicant proposes to build a pier beyond a pierhead line, beyond the line of navigation, or otherwise not consistent with s. 30.13 or NR 326, a permit under s. 30.12 must be applied for. The application would then be considered as a structure application, and all of the considerations outlined in handbook Chapter 70 should be examined.

B. Inquiries or Complaints about an Existing Wharf or Pier

Complaints are sometimes received from a riparian claiming that a pier or wharf which is being or has been constructed without a permit interferes with his rights. Such a complaint must be investigated by the Department. If the investigation shows that public rights or interest are involved, appropriate facts should be gathered and either local prosecution or a s. 30.03, Wis. Stats., enforcement action should be undertaken. If the controversy is a local one involving primarily the complainant and the person complained against, we should advise the complainant that he is free to file a complaint under s. 30.15, Wis. Stats. in local court. If the complainant chooses to request a hearing before an examiner pursuant to Section 30.14, Stats., our policy is to require the submission of sufficient information for the examiner to make a decision before scheduling a hearing. This policy has been adopted to reduce the incidence of

frivolous hearings.

The question of whether a pier or wharf interferes with public rights in navigable waters depends upon the facts and circumstances of each case. Important factors to be considered in making such determinations are:

- (a) The length, size, and position of the pier or wharf in relation to other piers or wharves in the vicinity;
- (b) the type of pier or wharf constructed;
- (c) the watercraft in use or suitable for use on the waterway.
- (d) depth contours of the water body adjacent to the pier or wharf; and
- (e) the location of adjacent property lines;
- (f) navigational use practices.

A pier or wharf which impedes the ability of adjoining riparians and others to navigate and have reasonable access to and from the shore in the vicinity of the pier violates Section 30.13, Wis. Stats. If the pier interferes with public rights, we should join in the action against the owner of the pier or start our own action.

C. Pierhead Lines

Section 30.13(4), Wis. Stats., provides that a pierhead line may be established by any municipality using the procedure specified in s. 30.11, Wis. Stats. The pierhead line must be enacted as a municipal ordinance and approved by the Department, then filed in accordance with Section 30.11, prior to the pierhead line becoming effective. Any pier or wharf which extends into navigable water beyond a lawfully established pierhead line is an unlawful obstruction of navigable water unless a permit has been obtained as provided by s. 30.12(2)(a), Wis. Stats. If the municipality has a board of harbor commissioners, the municipality must obtain the approval of the board as well as approval of the department prior to establishing a pierhead line.

FIELD INVESTIGATION AND ENFORCEMENT

1. Investigations

Upon complaint concerning an existing pier or wharf, the Department should investigate to determine if authority is required to maintain the structure. If the pier meets the criteria set forth in s. 30.13, Wis. Stats., and NR 326, Wis. Adm. Code, no Department action should be considered. If the pier or wharf obstructs navigation or violates any public rights, enforcement pursuant to s. 30.15, Wis. Stats., should be considered. If only private rights are affected, the Department should inform the complaining party that relief may be sought either before a hearing examiner or local court.

If the Department decides to take action against the owner of the pier or wharf, the conservation warden should take the lead in gathering the required evidence. Such evidence might typically include a survey of the pier and adjacent upland, preparation of a depth contour map near the site, taking photos of the site, and obtaining surveys of the adjacent property owner's lots. Bureau and district staff should be

utilized as necessary.

If the Department determines that no public rights are involved, the reasons for this decision should be documented. If the complaining party desires a hearing before an examiner, our policy is to request them to produce a survey of the piers in question, a depth contour map of the offshore area, and a map showing the location of the property lines. Without this information, the complaining party is free to start an action in local court, but we should not schedule a s. 30.14 hearing in the matter.

Upon receipt of an application for a new pier or to expand an existing pier, the Department should determine if any authority is required to construct the pier. If the pier or wharf meets the standards set forth in s. 30.13, Wis. Stats., and NR 326, Wis. Adm. Code, the applicant should be advised that no permits are required and the case dismissed. If a permit is required, the application should be evaluated under Section 30.12, and the procedures set forth in handbook chapter 70 should be followed.

2. Right to Access

The general principle in cases of limited navigation access in coves and bays is that each riparian owner must have a fair share of the line of navigation and a course of access to it from the shore exclusive of every other owner. The line of navigation means the 3 foot depth contour or a greater depth contour if required for boats in use or appropriate for use in the waterway, based on normal summertime low levels in the waterway or summer minimum levels where established by Department order. All specific rules for apportionment or division of the line of navigation are subject to modification as necessary to accomplish this result. (Thomas v. Ashland, Siskiwit & Iron River Logging Railway Company, 112 Wis. 519, 1904.) In this case, the apportioning was made on the basis of the amount of shoreline ownership.

The coterminous riparian rights (so called "Knitter" theory) approach to apportioning access to navigable water involves the shoreline geometry and property line termini. Chords are drawn to connect points established at the intersection of each lot line with the ordinary high-water mark. The lines which bisect the angle formed by adjacent chords are the coterminous riparian rights lines. The extension of the coterminous riparian rights lines to the line of navigation describes the portion of the water within which each riparian may place a pier to gain access to the line of navigation. If the coterminous riparian rights lines intersect before the line of navigation is reached, another method of apportionment will be used.

The instructions in the case Colson v. Salzman, 272 Wis. 397, 1955, regarding depths required for "such boats as are in use or appropriate to the lake" should be applied in conjunction with the "Knitter" theory. Unusual shoreline geometry or ownership patterns will likely crop up often enough to remind us to apply the general principle regarding the right of each riparian to have some access to the line of navigability.

Complaints of navigational infringement are also received which involve straight shorelines, or shorelines other than those in coves or bays. The same basic principle of access applies, although different approaches to extending property lines to the line of navigation are available. In any case, riparians are obliged to confine their piers within the water area proscribed by the shoreline, lines extending from the property termini to the corresponding points on the line of navigation, and the line of navigation.

For round lakes, a point at the center is sometimes established and lines are drawn to it from the property termini to establish the side bounds for each riparian's pie slice area for piers.

For elongated lakes, a center line is sometimes established. Lines drawn at right angles to the centerline from each property termini establish each riparian's area for piers in the elongated portion of the lake. The pie cutting method is used for establishing the riparian pier areas at the rounded ends of such lakes.

The center line approach is used on rivers. For rivers on which Corps' navigation projects exist, the navigation channel center line should be used.

The public right to navigate is of great importance to us. Approaches to assessing this right versus the rights of riparian owners to erect piers are less mechanical than the techniques mentioned above for determining riparian rights.

Factors mentioned earlier about the pier and watercraft in use or suitable for use on the waterway in question must be analyzed. Additional factors include the existence of travel lanes or channels, history of boating or incident uses such as fishing in proximity to the pier, and the existence of a pierhead line.

When all relevant facts have been gathered, they must be evaluated to establish whether the pier obstructs navigation.

MONITORING AND FINAL DISPOSITION

If a riparian applies for a permit for a pier and the Department determines that no permit is required, the applicant should be informed in writing. Future monitoring will simply consist of responding to any complaints about the pier, and determining whether the pier, as built, is in violation of any public rights.

If an application for a pier or wharf permit is filed, and the Department determines that a permit is required, the application should be handled as a structure permit under s. 30.12, Wis. Stats. A Division of Natural Resources Hearing examiner may issue or deny the permit after hearing. Any person objecting to the decision may seek judicial review by serving and filing a petition in accordance with the provisions of Section 227.15 and 227.16, Wis. Stats., within thirty (30) days of the decision date.

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CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

Date: October 14, 1981 File Ref: 3500
To: District Directors
Don Beghin - LE/5
Robert Roden - WRZ/5
Dick Knitter - WRZ/5

From: George Meyer

Subject: Program Guidance, Chapter NR 326, Wisconsin Administrative Code

Chapter NR 326, Wis. Adm. Code, contains standards and definitions for use in regulating construction of piers in navigable waterways. It establishes procedures to be used by the Department and by riparian owners in applications for permits for solid piers, piers which extend beyond an established pierhead line, and piers which exceed the standards contained in the chapter. In addition, procedures are established for use by the Department, riparian owners and the public to handle complaints about existing or proposed piers which violate sections 30.12 and 30.13, Stats.

The rule will not change our traditional posture regarding complaints. A complaint will have occurred when we cannot informally resolve a conflict. To handle a formal complaint, we will apply the procedures and standards of Chapter NR 326 in a formal hearing under s. 30.14 Statutes.

1. Purpose

The rule is intended to clarify the rights of riparian owners, to specify the permitting process which applies to piers mentioned in the first paragraph of this memorandum, and to provide for more consistent application of sections 30.12 and 30.13, Stats. It does not allow us to directly regulate the number of piers a riparian may place on the bed of a waterway. We were advised early in the rule making process that the Department at this time does not have that statutory authority.

2. Applicability

The rule will be applied only in the following situations:

- a. Existing piers: If a formal complaint is received and we are obliged to investigate and proceed to a public hearing, the standards of NR 326 will be applied. Any inquiry relative to piers must be responded to with the standards set forth in NR 326. We will not actively seek out for enforcement purposes piers not in conformance with NR 326 unless a formal complaint is received or the pier is causing an adverse effect on public rights in navigable waters.
- b. Proposed piers: We will apply NR 326 to a request for information about standards to be applied to pier construction (new piers and changes on existing piers). Where there are existing piers which do not conform to NR 326, strict application of the standards may result in complaints against the existing piers. In this case, we should encourage the municipality to adopt a pierhead line to promote uniformity.
- c. Piers not meeting the definition in Section 30.13; These piers (solid piers and piers on cribs and similar

solid foundations) require permits under s. 30.12 and the NR.326 standard will be applied during the permit process.

- d. Piers also being used for other purposes, such as a breakwater: A section 30.12 permit will be required for those existing structures upon receipt of a complaint. Modifications which would make the structure wider or longer requires that a section 30.12, Stats., permit application for the whole structure. Any new structures of this type require permits. Section 30.15, Stats., applies to all structures, therefore we will apply the standards of NR 326 upon formal complaint even 'if the structure was permitted previously.
- e. Wharves: Wharves were not included in this chapter, because they have apparently never been a major public concern resulting in inquiries to the Department. If problems ever develop relating to wharves, rules addressing those problems will be develop.

3. Definitions and Standards

The definition of pier adopted in this chapter allows the use of temporary boat hoists without a roof or walls. This creates a potential enforcement problem because of the numbers of temporary boat hoists which do include roof or walls. We will have to exercise extreme discretion in undertaking enforcement action only on the basis of roofs or walls over temporary boat hoists. It is possible that a future amendment would be needed to "fine-tune" the definition.

The rule does not specify the number of piers a riparian may place on a waterway adjacent to his or her property. Problems might occur with a backlot development which depends upon a relatively small riparian ownership for access to the waterbody or in a situation where a resort or condominium/hotel complex has a number of piers for guests/owners. We can regulate the length of piers and initiate an enforcement action under s.30.15 against a large number of piers which obstruct the use of an area of water. Unfortunately, section 30.13 does not provide clear guidance here, other than limiting pier rights to riparians.

In the definition, "line of navigation," a three foot depth contour was used as a general minimum for application to all navigable waterways. The language, "required for boats in use or appropriate for use on the waterway," is taken from the Wisconsin Supreme Court cases on piers and can be applied to specific waterways.

Even though a line of navigation standard is included in the rule, it is possible that physical constraints would result in situations where that standard would not be strictly adhered to. For example, if the depth of a stream does not exceed three feet, the rule in theory would allow a riparian to place a pier across the entire stream. Clearly that situation would be an obstruction of navigation and a much shorter pier would be required.

The concept of "depth required for boats in use..." and other Supreme Court guidance are used to deal with individual situations where the general 3-foot rule is not appropriate. It remains for each riparian to demonstrate that boats actually using the pier require greater depth than the 3-foot minimum. The greater depth required (if the riparian can make a successful demonstration of that need) would be used for that specific location. It would not change the line of navigation for the entire water body.

Local usage and common sense must be used by the public and the Department to determine appropriate boats (and thus depths for navigation) for any particular waterway. When we consider commercial navigation facilities, depth of water to accommodate a boat will usually be the project depth for the harbor. Pier length will often be based on the length of boats using the pier. Many commercial piers are solid structures that will require s. 30.12 permits.

The term, "marina," should perhaps have been defined in NR 326. Until a definition is placed in the rule, we

will define "marina" as a commercial facility for rental of boats and/or slips. Note that NR 326.04(8) also applies to "Other similar mooring facilities." These would include such things as:

- (a) piers serving multiple ownership/occupancy properties including condominiums, hotels, resorts, etc.
- (b) piers providing access to the water for backlot owners.
- (c) piers associated with yacht clubs and shipyards.

All marina or other similar mooring facility piers which extend beyond the line of navigation or the prescribed exemptions thereto require a permit under section 30.12, Statutes. The length of these piers is generally dictated by the number of slips rather than by water depth or length needed for individual boats. However, the 30.12 standard prohibiting material obstructions to navigation will limit the ultimate length of such piers. We will apply chapter NR 326 to such piers only upon complaint, as stated in the applicability section of the rule. Size or number of piers cannot be used alone to determine whether a facility is a marina. Complaints on such piers will be addressed on a case-by-case basis.

On controlled lakes or flowages, required water depths for boats will be based on the minimum authorized water level during the open water navigation season. On uncontrolled lakes, depth should be based on a representative water level toward the low end of the range (for example, Corps "Low Water Datum, 576.8 ft IGLD," would be an appropriate level to use for Lake Michigan).

In areas that have been dredged, water depths should be related to an extension of the natural bottom contours on either side of the dredged area. We should also realize that depth below the still water level may not be sufficient in many situations. Where boats are subject to upward and downward movement due to waves, we should allow an additional depth equal to half the expected wave height plus a small factor of safety. We can't assume motors will be tilted up, especially large outboards and inboard/outboards. We also should consider the depth required when a boat has one individual in the back (stern).

Where piers were part of a development previously approved by the Department and the plans or documents involved in that approval indicate the piers, we should consider these piers authorized and only proceed against them on the basis of a formal complaint from outside the Department. In the future, such piers would have to conform to NR 326 or be permitted under s. 30.12.

4. Procedures

The permit process required under section 30.12, Stats., for a solid pier will consider the fact that this type of pier could interrupt littoral drift. The requirement for an opening to allow passage of littoral drift will make the solid pier conform to the statutory standard which prohibits piers that cause the formation of land upon the bed. A solid pier will usually interfere with the free flow of water. The opening for passage of littoral drift should help to compensate for this. Opening size for littoral drift will be determined by the applicant and provided as a part of the necessary information in the application. Internally, this determination will be reviewed by coastal engineers in the Water Regulation Section.

The Department has an obligation under s. 30.14, Stats., to hold hearings on complaints about piers that violate the standards of s. 30.13, Stats., and NR 326. This requirement also, logically, means that we will have to investigate complaints. Where a pier is an obstruction to the public's right to navigate, the Department will fully investigate and document facts, using input from citizens where available. Where our initial investigation determines that public rights are not involved and that private riparian rights are in conflict, we will rely on the complainant to provide a full explanation of the problem created by the pier. As a rule, we should ask the complainant for an adequate survey showing property boundaries and pier locations). This is a reasonable request because the burden of proof is placed on the complainant. Where the complainant cannot do so (by being prevented from going on the property to survey the pier location, for example), we will have to take steps to get

the complainant access to perform the survey or may have to do it ourselves.

Where the only issue is the length of a pier and the depth of water to which it extends, a full survey will not be necessary. A water level reading, measurement of the pier's length, and depth soundings at intervals out to the end of the pier will normally suffice. We would also need information on the type of boat using the pier.

The approaches provided in NR 326.07(3)(a) and (b), to create an adequate separation between adjacent riparians along their common line, will always produce a solution. In some severely restricted situations, there may need to be positive cooperation between the conflicting riparians. We believe that at least one of the three listed methods of defining the areas where a riparian may place piers (by apportioning the line of navigation) will work in most cases. However, the rule does not force us to use any of these approaches if a better method is available. The rule also restates the overall court standard that all riparians must have access to the line of navigation independent of all other riparians.

As you know, the Court of Appeals has upheld the Kenosha County Circuit Court in the Nosek v. Stryker case. We expect that the decision will be appealed to the Wis Supreme Court. Until the decision is final, it will have no affect on NR 326. Once a final decision is issued, we may have to consider amending the rule.

cc: Jim Kurtz – LEG/5
Mike Cain - LEG/5
Jim Addis - FM/4

0849K

CORRESPONDENCE/ MEMORANDUM**STATE OF WISCONSIN**

Date: September 8, 1981 File Ref: 3500

To: District Directors
Robert Roden - WRZ/5
Don Beghin - LE/5
Dick Knitter - WRZ/5
Ed Brick WRZ/5

From: George Meyer - ADM/5

Subject: Proposed Program Guidance, Swimming, Waterskiing and Mooring Rafts

Rafts in navigable waters do not receive clear, concise treatment in Chapter 30, Statutes. They are, however, in common usage on navigable waters throughout Wisconsin. They are located adjacent to piers or within the riparian zone of a navigable waterway for use while swimming. They are used less frequently but at various locations well away from shore by waterskiers as starting platforms and as ski jumps. They are being considered, especially in the Southeast District, for use as boat mooring devices. Use of a raft for mooring would accommodate more boats than a pier.

All three types of rafts are similar with regard to construction of the raft and securing it in position on the navigable waterway. All three types of rafts fit the description of a structure because they have form and utility. The period of the year in which these rafts are used is also similar (the open-water recreation season).

The rafts differ from each other with respect to their location on the waterway. Swimming and mooring rafts are usually located in the near-shore, riparian portion of the waterway. Ski jumping rafts are generally located well away from shore to provide for maneuvering room and sufficient water depth. The area of water needed during use of the rafts also differs. Swimming raft use would most likely utilize the area immediately adjacent to the raft and the lane of water between the pier or shoreline and the swimming raft. The ski jumping raft requires a large area of waterway to support the practice of waterski jumping. The boat mooring rafts require sufficient room adjacent to the raft to allow for boats to maneuver into and out of the slips around the raft.

Common construction practice is to use flotation devices which are secured by timbers or metal structural members which in turn support a deck, finger piers, or the ski jumping ramp. These rafts are commonly restrained by an anchor and connector between the raft and the anchor (e.g., wire rope, rope, cable) or in less frequent instances are supported and restrained in place by piling (or spud poles) driven into the bed of the waterway.

The proposed regulatory treatment for these rafts is as follows: (1) swim rafts would be authorized for use by riparians in an amended version of section 30.13, Stats. The swim rafts would be subject to local regulations under Section 30.77, Stats. (2) Waterski rafts are now and will be regulated by permit under section 30.12, Stats. (3) Boat mooring rafts would be regulated by permit under Section 30.12, Stats.

We will also attempt to develop statutory definitions for these types of rafts in s. 30.01, Stats. This would have to be compared with a proposed definition for fishing rafts in the suggested Wolf River legislation and with the

"fixed houseboat" definition in NR 325. Mike Lutz is working on legislation to allow local regulation of mooring buoys. Our handling of mooring rafts may parallel this effort.

Our present plan for these rafts is as follows:

1. Swim rafts. We will take action only in response to complaints that a swim raft is obstructing navigation or presents a hazard to navigation. We will pursue an enforcement action under Section 30.15, Stats., on the basis of the facts of each case. Abatement options would include moving the swimming raft to a location out of a navigation channel, generally closer to shore, or to add lights or other warning devices to the raft.

Until remedial legislation is developed, we may receive applications for Section 30.12 permits for swim rafts. When we receive an application, we should process it as a routine structure under s. 30.12. If we receive a complaint, the owner of the raft will have the option of applying for a permit. Where enforcement is occurring or impending, we should accept the application and proceed to a joint permit/enforcement hearing. This would be consistent with our approach to regulating piers under ss. 30.12 and 30.13 and would fit in with the proposed remedial legislation. Obviously, this procedure is based on the assumption of a small number of permit applications that will have to be processed.

2. Waterskiing rafts. We will regulate the placement and use of waterskiing rafts by Section 30.12, Stats., permits. An exception to the permit requirement for waterski jumping rafts would be the day-use of a raft which is stored along the shore or on shore when not in use and moved into location on the waterway during periods of use. We will phase in the permit requirement for waterski rafts over a 2-3 year period. We will coordinate the permitting activity with the Wisconsin Waterski Federation. We previously sent you a package of material used by Ed Bourget for staff usage program-wide and an order denying a permit for a water ski jumping raft on Lake Nagawicka.

Each District should, with assistance from the Bureau of Water Regulation and Zoning, develop a plan to phase in waterski raft permit requirements so that all existing rafts are either permitted or in the process of being removed pursuant to Department order by June 30, 1984. The Bureau is meeting with the Wisconsin Water Ski Federation and should have additional thoughts on removal strategy in the next 1-2 months. At a minimum, we will be formally notifying the Federation of our intentions.

3. Mooring rafts ("Star" buoys). While we are not aware of any of these in existence at this time, we will take the position that a s. 30.12 permit is needed and will proceed with enforcement action (s. 30.15) on rafts without permits. To receive a permit, a mooring raft would have to meet the standards in s. 30.12. We will take this position that any such raft which does not (1) meet local regulations governing the placement of piers or rafts in navigable waters and (2) the standards for piers (water depth, separation from adjacent riparians, etc.) found in NR 326 is detrimental to the public interest and may be an obstruction to navigation.
4. Mooring buoys. While these buoys are structures that could require a s. 30.12 permit, we have taken the position that they should be regulated by local permit under s. 30.74, Stats., and section NR 5.09, Wis. Adm. Code. The depth at which mooring buoys can be placed will generally be beyond the line of navigation since a boat will swing in an arc around the buoy.

Our future action plan for these rafts is as follows:

1. Seek a modification of section 30.13, Stats., to allow use of swim rafts that do not obstruct navigation or otherwise interfere with public rights. Modify Chapter NR 326, Wis. Adm. Code, to reflect this amended legislation by including standards for swim rafts. Thereafter- we would administer Chapter NR 326, Wis. Adm. Code, for both swim rafts and piers.

2. Regulate waterski rafts by Section 30.12, Stats., permit.
3. Regulate boat mooring rafts by Section 30.12, Stats., permit.

Procedures for handling the permitting of or enforcement against these rafts are unchanged from past practices. For swimming rafts and boat mooring rafts the approaches included in Chapter NR 326, Wis. Adm. Code, for use in determining allocation of waterway space for piers may be useful in determining the location of these rafts. Our response to complaints about a ski jumping raft will be similar to past actions taken under Sections 30.14, Stats. and 30.15, Stats.

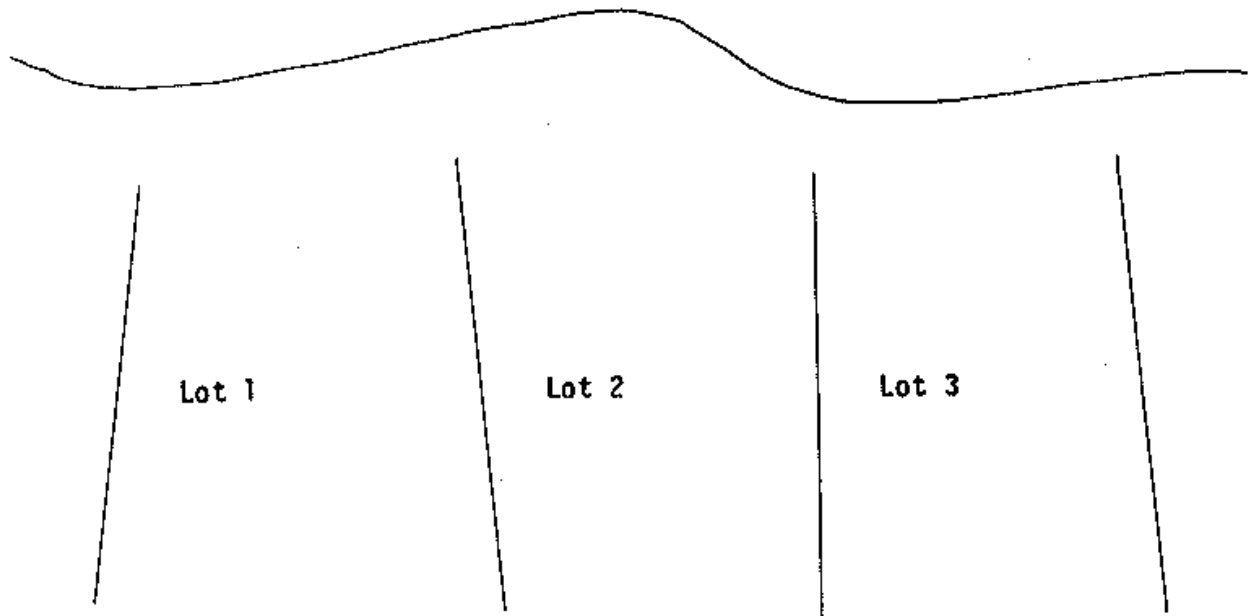
RR:jkb

cc: Michael Cain - LEG/5
Larry Larson - WRZ/5
Jim Addis - FM/4

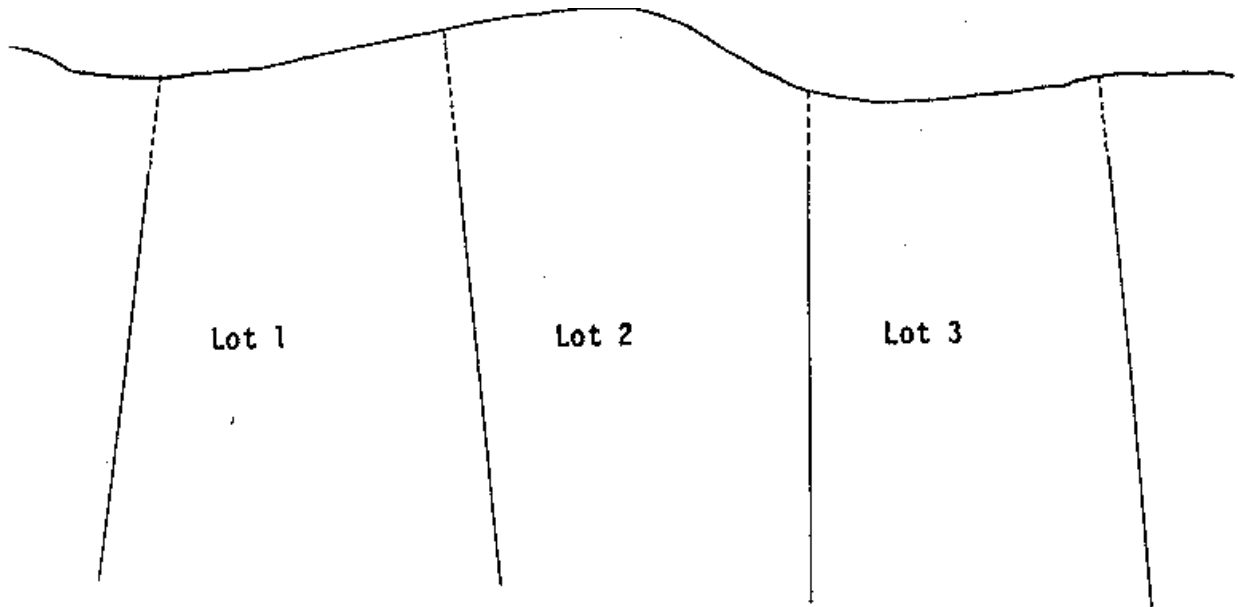
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COTERMINOUS RIGHTS THEORY

Step 1: Draw shoreline (OHWM) and lot lines



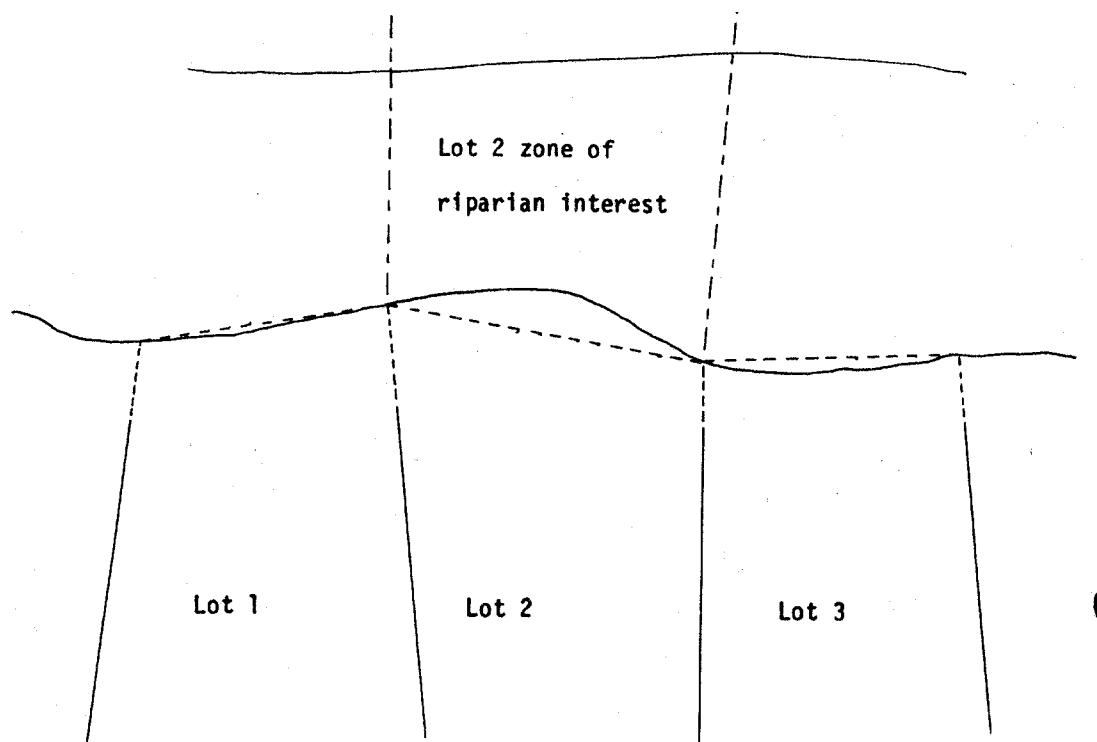
Step 2: Extend lot lines to OHWM



Step 3: Draw chords connecting points found in step 2

[image here]

Step 4: Bisect angles formed by chords drawn in step 3. Draw in line of navigation at the appropriate depth for the watercourse. Each lot will then have a designated zone of riparian interest.



CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

DATE: January 10, 1986

FILE REF: 3560

TO: **District Directors (WMC)**

PMMS Response

Insertion: Chapter 75, Water Regulation Handbook

FROM: Robert W. Roden

Distribution: Program Staff

Subject: Interpretation of NR. 326.04(3)(0), LITTORAL DRIFT OPENINGS

We have been asked to provide guidance concerning the requirement of NR 326.04(3)(b) that solid piers shall be provided with sufficient opening to provide for the passage of Littoral Drift and to provide general standards for the size of the opening, the location of the opening and the depth of water where the opening should be placed.

Due to the number and complexity of the variables involved it is not possible to provide "General" standards for these littoral drift openings. Some of the variables that would need to be considered in each case include the local wave climate, bottom topography and bottom material type, size and availability. Determinations on the need, size and location of such openings should be handled on a case by case basis and include, as needed, a site visit, review of performance of similar nearby structures, and discussion with local residents and/or contractors that are familiar with the site in question.

Permits issued for solid piers should include a condition that we may require the addition or modification of littoral drift openings if the structures fail to perform as expected or problems with littoral drift develop in the future.

Reviewed By: John Coke
Scott Hausmann
Mike Cain

JC:EB:sm
7458K

CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

DATE: March 13, 1986 3560

TO: District Directors (WMC)

PMMS Response: Insertion: Chapter 75, Water Regulation Handbook

FROM: Robert W. Roden

Distribution: Program Staff

SUBJECT: Reasonable Mooring Fee, NR 326.04(8)

A marina exists with all docks and piers lying behind the line of navigation. Portions of the marina have been approved by DNR (dredging contracts). In regards to this scenario, we have been asked the following questions:

1. Question: Can this marina charge a fee which requires membership in a condominium? Lifetime fees run from \$7,300 to \$13,150 per slip.

Response: Since in this case all the piers are behind the line of navigation and no permits are required under 30.12(2), the requirements of NR 326.04(8) for public access and reasonable fees do not apply. As long as the standards of 30.13 are met and no permits are required under 30.12, the riparian owner has the right to sell or rent mooring space whether the fees are "reasonable" or not.

2. Question: If the answer to question 1 is yes, can we invoke 30.03(4) "...a possible infringement of the public rights therein..."?

Response: If a case can be made that the marina is an infringement of the public rights in navigable waters, the Department could conduct a hearing pursuant to ch. 227 and issue an order directing the owner to "perform or refrain from performing such acts as may be necessary to fully protect and effectuate the interests of the public in the navigable waters." Such a case would in all likelihood have to be based on more than the fact that fees were being charged, although such would certainly be a factor. Examples of additional factors would be density and size of the mooring area, obstructions to navigation and availability of other access. One potential option for such an order to "effectuate the interests of the public" may be to include conditions requiring a portion of the marina to be open to the public at a "reasonable" fee. Determination of a reasonable fee should be on a case by case basis and based on a capitalization over the design life of the project of the costs of initial construction, operation and maintenance. The fees should include a schedule of rates for different time periods such as daily, weekly, monthly and seasonal based on a proportion of such capitalized costs.

Reviewed By:

John Coke
Scott Hausmann
Mike Cain
Mike Lutz

JC:EB:dlm
4763I

CORRESPONDENCE/ MEMORANDUM**STATE OF WISCONSIN**

DATE: April 2, 1986 FILE CODE: 3500

TO: District Directors

FROM: Robert W. Roden - WZ/6

PUT IN: Ch. 75, Water Regulation Handbook

Distribution: All Program Staff

SUBJECT: Program Guidance Concerning Covered Shore Stations with Regard to Wisconsin Administrative Codes NR 325 and WR 326

We have been asked to provide guidance concerning the regulation of seasonally removed covered shore stations. Seasonally removed covered shore stations are addressed specifically in two separate administrative rules. NR 325.03(2) defines "boathouse" and in part states "for the purpose of this chapter the term boathouse does not include shore stations or boathouses which are removed from a waterway on an annual basis." NR 326.03(6) defines "pier" and in part states that a pier "...may include a temporary boat hoist without roof or walls. "

The two codes may, on initial reading, appear to be contradictory. Because NR 325.03(2) specifically excludes shore stations from the purview of NR 325 it could be construed that covered shore stations are acceptable usage within the near shore area. We, however, interpret NR 325 as not applicable to the regulation of shore stations removed on an annual basis. Section 30.121, Wis. Stats., and the associated administrative code NR 325 are mechanisms for regulating the maintenance of existing boathouses. The exclusion of shore stations (both covered and uncovered) does not authorize the construction, use or maintenance of such structures. Instead, we interpret the exclusion of shore stations from this administrative code as the need to seek legislative authority in some other section of the statutes.

NR 326 allows for shore stations to be adjacent to piers but specifically excludes covered shore stations. George Meyer specifically addressed NR 326's definition of pier within a program guidance dated September 8, 1981. Within that guidance, Mr. Meyer stated:

"The definition of pier adopted in this chapter allows the use of temporary boat hoists without a roof or walls. This creates a potential enforcement problem because of the numbers of temporary boat hoists which do include roof or walls. We will have to exercise extreme discretion in undertaking enforcement action only on the basis of roofs or walls over temporary boat hoists. It is possible that a future amendment would be needed to 'fine-tune' the definition."

The fine tuning Mr. Meyer talked about has to date not occurred. Therefore, the exclusion of covered boat hoists within the definition of pier means that they must be authorized via a separate statute (i.e., Section 30.12) or are technically illegal structures.

Reviewed by:

Ken Johnson
Dick Knitter
Scott Hausmann
Mike Cain

5037I

CORRESPONDENCE/ MEMORANDUM**STATE OF WISCONSIN**

Date: March 1, 1990 IN REPLY REFER TO: 3560-7

To: District Directors

PMMS Response: Insertion: Chapter 75 Water Regulation Handbook

From: Scott Hausmann- WZ/6

Distribution: WRZ Program Staff

Subject: Section 30.12 Permits For Piers

The issue of processing s. 30.12 permits for piers has recently been raised. What has happened recently is that permits are now being applied for by persons whose existing piers may not conform to the draft NR 326 revised standards. The apparent logic for applying now is that a permit issued at this time would ensure that the new standards could not be retroactively applied once the rule is revised to those existing piers that would not meet those new standards.

There would seem to be three situations that need to be addressed in handling these applications. These are:

- 1). The pier needs to be permitted because it doesn't meet the criteria in existing NR 326. This could occur because of the manner of construction (e.g. rock cribs on inland lake), location on the property (violates "riparian rights line), or length out from shore (beyond necessary depth). NR 326 is to be applied either on complaint or because of a s. 30.12 application. NR 326 and s. 30.13, stats., form the basis for a decision whether a permit is necessary for the pier. The Department should determine whether the permit can be issued in light of the standards in s. 30.12, stats. A pier which violates s. 30.13(l)(a) or (b) would obviously be contrary to s. 30.12 as well.
- 2.) The pier needs to be permitted because it doesn't meet the general standards of s. 30.13, stats., as elaborated on by the proposed NR 326 revisions. A proposed rule cannot be applied as such until it is legally promulgated. However, if the content of the rule constitutes a logical interpretation of the existing statutes or case law, it can be applied in that context. This means that provisions of the proposed rule could be a basis for Department interpretations of the statutes in the interim while the rule is being developed. However, these provisions cannot be quoted directly as the basis for a decision. Rather, their "authority" derives from the statutes which they interpret and they can guide staff in determining whether or not a permit is required or should be issued for a pier.
- 3.) The pier doesn't need to be permitted because it complies with existing NR 326 and the general standards contained in s. 30.13, stats., as enunciated in proposed NR 326. In this case, no permit is required and the application should be dismissed.

This seems to cover the situations we are likely to be faced with over the short term. Mike Dresen is currently working on a draft of a more detailed program guidance on evaluation criteria for piers, wharfs, swimming rafts and boat shelters that will be distributed as soon as it is finalized.

Drafted by: John Coke

Reviewed by: Mike Dresen- WZ
Ken Johnson- WZ

CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

DATE: May 3, 1990 IN REPLY REFER TO: 3550

TO: District Directors (WMC)

PMMS Response: Insertion: Chapter 75, Draft Water Regulation Handbook

FROM: Scott Hausmann - WZ/6

Distribution: WRZ Staff
Legal Services

SUBJECT: Grandfathering of Certain Piers Placed By Non-riparian Owners

Section 30.131, Wharves and Piers Placed and Maintained By a Person Other Than the Riparian Owners created by 1989 Wisconsin Act 217 (1989 Senate Bill 441) became law on April 27, 1990. The important features of the attached bill are:

1. It applies only to piers placed by nonriparians based on written access easements that were entered into before December 31, 1986.
2. It does not apply to any pier that require permits under ss. 30.12(l) and 30.13.
3. All 6 requirements (subs. (1) to (6)) must be met before the exemption from the requirement that piers be placed only by riparian owners.
4. The law does not affect DNR ability to seek removal when the pier violates any other standards in ss. 30.12 and 30.13.

Related Guidance: None.

Requested By: -

Drafted By: Mike Dresen, Scott Hausman

Reviewed By: Mike Cain

D:EB:pcl
v:\9005\wz9grand.mdd
Attach.

STATE OF WISCONSIN

1989 Senate Bill 441

Date of enactment: April 12, 1990
Date of publication: April 27, 1990

1989 Wisconsin Act 217

AN ACT *to create* 30-131 of the statutes, *relating to* wharves and piers placed and maintained on riparian land.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 30.131 of the statutes is created to read:

30.131 Wharves and piers placed and maintained by persons other than riparian owners. A wharf or pier of the type which does not require a permit under ss. 30.12(1) and 30.13 that abuts riparian land and that is placed in a navigable water by a person other than the owner of the riparian land, may not be considered to be an unlawful structure on the grounds that it is not placed and maintained by the owner if all of the following requirements are met:

(1) The owner of the riparian land or the owner's predecessor in interest entered into a written easement that was recorded before December 31, 1986, and that authorizes access to the shore to a person who is not an owner of the riparian land.

(2) The person to whom the easement was granted or that person's successor in interest is the person who places and maintains the wharf or pier.

(3) The placement and maintenance of the wharf or pier is not prohibited by and is not inconsistent with the terms of the written easement.

(4) The wharf or pier has been placed seasonally in the same location at least once every 4 years since the written easement described in sub. (1) was recorded.

(5) The wharf or pier is substantially the same size and configuration as it was on the effective date of this subsection..... [revisor inserts date], or during its last placement before the effective date or this subsection [revisor inserts date], whichever is later.

(6) The placement of the wharf or pier complies with the provisions of this chapter, and any rules promulgated under this chapter and with any applicable municipal regulations or ordinances.

CORRESPONDENCE/ MEMORANDUM**STATE OF WISCONSIN**

DATE: February 22, 1991 FILE REF: 3500

TO: Water Management Supervisors
Water Management Specialist
Water Regulation Staff
Mike Cain & Mike Lutz - LC/5

FROM: Ken Johnson - WZ/6

SUBJECT: Regulation of piers - Interpretation of Regulations

NR 326 was adopted in 1983 and codified how we regulate piers. Since its adoption many questions have arisen. Some have been answered informally or by administrative hearing officers and others have been left unanswered. We are proposing program guidance on these issues to gather the questions and answers in one place for everyone's use.

We'll be working on these questions over the course the next few weeks. Please add your ideas about issues (and resolutions) to the list below and get back to me by March 15th or give me a call with your ideas:

What is a Marina or other similar mooring facility? [NR 326.04(8)]

How many slips, mooring buoys or related structures are required to be considered a marina or similar facility?

Should condos and similar private multi pier facilities be treated the same as a marina?

Do marinas and similar facilities located behind a pierhead line require a permit if they extend beyond the line of navigation?

What kind of structures can be located on a pier?

Gasoline pump house, ticket stand, fish box, benches, rails, diving platform, deck or storage locker?

What is a license to place a pier and what does it mean (how can riparian legally grant pier use rights to another party)?

Should we try to limit the term of such licenses (at what point are property rights conveyed)?

Who is responsible for compliance with regulations?

How do we determine the line of navigation?

Is a Department approved pierhead line the line of navigation? Do we need to change the rule language to allow going beyond the three ft. contour only for craft "in use or appropriate for use" at the site rather than "on the water way?" [NR 326.03(2)]

What is reasonable riparian access?

Does limiting the number of slips, buoys, shelters, etc. per unit of shoreline provide an effective approach?

How should/do mooring buoys affect our determinations?

What portion of marinas and similar facilities which extend beyond the line of navigation must be "open to the public?" [NR 326.04 (8)]

What facilities must be "open to the public?"

- percentage of slips?

- flat number of slips?

- all facilities beyond line of navigation?

- including parking & other facilities which make public use a practical possibility?
- all of the marina or similar facility?
- definition of "reasonable mooring fee?" [NR 326.04 (8)]

What conditions should be imposed in a permit to assure public availability?

Should/do we treat existing piers or multi pier facilities different from new ones?

cc: Bob Roden WZ/6

CORRESPONDENCE/ MEMORANDUM**STATE OF WISCONSIN**

DATE: December 19, 1991

FILE REF: 3550

TO: District Directors (WMS)

Insertion: Ch. 75 Water Regulation Handbook
Law Enforcement Handbook

FROM: George E. Meyer - AD/5

Distribution: WRZ Program Staff
Bureau of Legal Services
Bureau of Law Enforcement
Dept. of Justice - Environmental Unit

SUBJECT: Program Guidance - Riparian Berths and Moorings

ISSUE SUMMARY

This guidance deals with one component of the public interest test established by statute for berths [piers and wharves in s. 30.13(1)(a), Stats.] and moorings [buoys and associated components in s. 30.772(2)(a), Stats.]. You should determine if any other statutory criteria listed in the above sections or other public interest factors (e.g. critical habitat, wild or scenic rivers, etc.) would impose greater restrictions on construction and placement before you apply the guidance described here.

- 1) Berthing and mooring privileges generally accrue in proportion to the amount of shoreline owned.
- 2) Projects which exceed a threshold number of berths per unit of shoreline are likely to require permit analysis and we may object to such permits because of their cumulative adverse effects on public interests in waters.
- 3) Projects which exceed the threshold for density of berths but support exercise of public rights in waters may be evaluated differently than private facilities.
- 4) A riparian may grant a short term license to "rent out" use of berths.
- 5) A pierhead line [s. 30.13(3), Stats.] should generally conform to the line of navigation.
- 6) Pier width and accessory construction on piers are limited to what is essential for berthing watercraft.

NEED FOR GUIDANCE AND RATIONALE

Increasing recreational boating demands on our waterways have produced conflicts between riparians over the extent of riparian berthing and mooring rights. Those same pressures also pose a threat to public rights and interests in waterways. Berths and moorings related to marinas and private back lot or condominium development in particular have the potential to cause use conflicts, endanger public safety and over burden aquatic resources.

This guidance is intended to assist in administration of statutes and administrative rules related to the construction and placement of piers and wharves (s. 30.12 & 30.13, Stats. & NR 326) and mooring buoys (s. 30.772, Stats.). It should be applied after and in addition to any other requirements (sensitive resource protection, unobstructed navigation, etc.) which might impose greater limitations on construction and placement.

RIPARIAN BERTHING and MOORING PRIVILEGES ARE LIMITED BY PUBLIC RIGHTS & INTERESTS IN WATERWAYS

Statutes allow a riparian property owner to "construct a wharf or pier... in aid of navigation" without a Ch. 30 permit if it does not interfere with public rights in navigable waters [s. 30.13(1), Stats. includes other standards as well]. Case law has established that a riparian may not exceed a "reasonable use" of property. What is considered reasonable will vary depending on factors which include sensitive resources which limit use of the shoreline or near shore area, other development along the shoreline, the amount of shoreline frontage owned and other issues which affect public rights and interests in navigable waters such as water quality, natural scenic beauty, navigation, etc.

Unless riparian berths and moorings are held to reasonable limits, the near shore area of many waterways will, over time, be largely occupied by these structures and watercraft. Public use of such areas would, as a practical matter, not be possible and public interests in recreational safety, aquatic habitat, water quality and natural scenic beauty would be adversely affected. Wisconsin's Environmental Policy Act [s. 1.11, Stats. & NR 150.22(2)] requires the Department to consider the cumulative environmental effects of these activities and to exercise its regulatory and management authorities to avoid significant adverse effects. These facts in combination require us to provide guidelines which identify the threshold beyond which there should be a more rigorous evaluation to determine whether a riparian owner may have exceeded reasonable berthing and mooring privileges and adverse effects on public rights and interests in navigable waters are significant.

IMPLEMENTATION OF GUIDANCE - PIER AND WHARF CONSTRUCTION

- 1) Proposals for pier or wharf construction which exceeds a "reasonable use" threshold will require permit analysis to determine if cumulative and long term adverse effects on public interests in navigable waters are significant. We will continue to require permit analysis for proposals where we expect that other legal requirements may not be met (s. 30.13, Stats. standards).
- 2) We will object to such permit applications if permit analysis reveals that standards in s. 30.12(2) including a cumulative impacts analysis based on "reasonable use" criteria will not be met. Commercial and industrial facilities which demonstrate a need for greater construction or marinas and similar facilities (described below) may qualify for a greater number of berths or moorings than would otherwise be available for a similar amount of frontage. Proponents of these projects must demonstrate that their project will comply with appropriate standards.
- 3) We cannot simply cite the guidelines described below ("reasonable use" threshold, pier width, etc.) in

denying permit applications. They are not rule or statutory standards. Any objection or permit denial must state how the proposal which exceeds the threshold or guidelines in combination with similar future projects would not comply with statutory requirements by adversely affecting particular public rights and interests in a particular water.

"REASONABLE USE" THRESHOLD

Provided other legal requirements are met [s. 30.13(l) & 30.772, Stats. & NR 326], the "reasonable use" threshold is reached when a property exceeds two berths for the first 50 feet or lesser amount of shoreline and one berth for each additional 50 feet of shoreline in common ownership. We will define a berth as a space at a pier, wharf, boat hoist, boat shelter, or boathouse (wet or dry) for a single watercraft appropriate for use at the site and commonly in use at similar sites on the waterway. (As an example, a 100 ft. lot with a dry boathouse which has space to berth a single watercraft and a pier which provides space for berthing at either side would provide berths for a total of three watercraft and would not exceed the threshold.) Multiple owner lots such as condominiums, "access lots" or other similar ownership arrangements are not entitled to greater berthing privileges than the shoreline frontage would otherwise provide (2 for the first 50 ft. & 1 for each additional 50 ft.).

MOORING BUOY AUTHORIZATION

The term "mooring" is specifically defined [s. 30.01(3e), Stats.] Placement of such structures is governed by separate statutes (s. 30.772 & s. 30.773, Stats. for designated mooring areas) which administered by Department law enforcement personnel. Permits are not required for mooring buoys placed within 150 ft. of the ordinary highwater mark (OHWM) or within 200 ft. of the OHWM when permitted by local ordinance if mooring placement and use comply with statutory standards which are substantively the same as for piers and wharves placed without permit [s. 30.13(l), Stats.].

Among these standards is a requirement that such placement and use may not "interfere with public rights or interests in the navigable waters." A riparian owner does not have an implicit or explicit right to fill his entire riparian zone out to 150 ft. from the OHWM (or 200 ft. by local ordinance) if this would interfere with public rights and interests. This public interest determination should include an analysis of cumulative effects of similar repeated mooring placement and use and a consideration of the "reasonable use" guidelines provided in this memo. These factors should be considered by law enforcement personnel when: 1) reacting to complaints or concerns about individual mooring placement; 2) approving local mooring ordinances [s. 30.772(3), Stats.]; and 3) approving designated mooring areas (s. 30.773, Stats.). This "cumulative effects" concern is only one among many that must be addressed when making such decisions. Successful implementation of these provisions will require cooperation and assistance across Department programs.

In approving permits for piers under s. 30.12, Stats., water regulation personnel should impose conditions which prohibit or limit the placement of moorings in adjacent waters if permit analysis determines that such placement in combination with the permitted pier or wharf construction would interfere with public interests in waters. In such cases permits must cite authority under s. 30.772, Stats. and include appropriate findings of fact and conclusions of law related to standards in that statute. As a practical matter this means that we will require riparians to choose between pier and mooring placement where placement of both will interfere with public rights in waters. Where limitations on mooring placement are included as a condition in a pier permit, water regulation personnel will obtain concurrence from appropriate law enforcement personnel prior to issuing the permit and will provide them a copy of the permit when issued.

MARINAS AND SIMILAR FACILITIES

We will treat all proposed berthing facilities as "marinas and other similar mooring facilities" subject to provisions of NR 326.04(8) if:

- 1) they require s. 30.12, Stats. permits (not designated mooring areas);
- 2) they are not industrial or commercial shipping facilities; and
- 3) they exceed reasonable use criteria described above

Such facilities must be open to the general public and comply with s. 30.12(2), Stats. permit standards to qualify for berthing beyond reasonable use criteria. This treatment of marinas and similar facilities is reasonable if they function in support of exercise of public rights in navigable waters, i.e. they provide access to waterways and related services.

In order to qualify, such facilities must provide all berthing facilities which exceed the "reasonable use" guidelines to the general public free or for a reasonable fee.

It is not necessary to designate a proportion of facilities for transient users since demand for particular boating related services (fuel, food, mechanical service, etc.) will decide need for transient docking.

A reasonable fee is one comparable to those charged the general public for similar facilities on the waterway or on a similar waterway in the vicinity. Use of berths may not be conditioned on membership in a private club or the purchase of property, goods or services.

If berths are for rent on a seasonal basis, permit conditions must assure that such facilities are available to the general public and are not, as a practical matter, restricted to private clientele:

- 1) the public must be adequately notified of their availability;
- 2) reasonable public access to the facility and appropriate parking must be provided; and
- 3) a waiting list for rental must be maintained which is continuous from year to year.

These features and any others necessary to assure public availability should be included as conditions in any required permits.

EXISTING BERTHING FACILITIES

Existing berthing facilities which exceed "reasonable use" guidelines may continue to rely on any permit which authorizes specific construction. This remains true unless significantly changed conditions and resulting effects on public rights require permit revision (the Department maintains continuing jurisdiction over such projects). The Department may apply "reasonable use" criteria and require modification or commence and enforcement action against any existing facilities (particularly those undergoing major repair) for which a permit has not been issued if it finds that current statutory requirements have not been met. Generally we will not hold existing facilities to the same "reasonable use" guidelines which we will apply to new proposals since, to some extent, they may have established some limited interest in use of existing facilities.

LICENSING OF BERTHS

Only a riparian owner, one who holds title to lands abutting a navigable waterway, may place or "construct" a

pier or wharf and related berthing structures. Another party may do the actual work as agent for a riparian but the riparian retains full ownership of the structure as well as responsibility for its legal placement and maintenance (permits et al.) A riparian may grant a revocable license for use of his private berthing facilities. A license should be limited to a short period (generally less than 5 years). Granting a license for use of berthing facilities to another party does not expand a riparian's "reasonable use" threshold (2 berths for first 50 ft. of frontage, etc.) Easements, leases and other agreements do not convey to a nonriparian the right to independently construct, place or maintain a pier or related structures because they do not transfer title to land. Statutes allow only riparian owners to place piers and other structures [with the exception of "grandfathered" easements under 30.131 (April, 1990 revision)].

RELATIONSHIP OF PIERHEAD LINE TO LINE OF NAVIGATION

A pierhead line is established by municipal ordinance [s. 30.13(3), Stats.]. In addition to the public rights test required by statute [s. 30.13(3)(b), Stats.], the rule standards related to pier length apply to the Department's pierhead line approval decision. Generally, piers may extend to the greater of boat length, the 3 foot water depth contour or to a greater depth contour if required by the draft (not the number) of craft using the pier [NR 326.04(1)]. A pierhead line can be viewed as an administratively established line of navigation except in those cases where public rights concerns require it to be located closer to the shoreline than the line of navigation. Rather than a fixed distance from shore or the ordinary highwater mark, a pierhead line should "conform as nearly as practicable" (see s. 30.11, Stats. for bulkhead lines) to the depth contour at the line of navigation. The establishment of a pierhead line affects only pier length. Any pier construction within a pierhead line must meet other applicable requirements including "reasonable use" guidelines.

The Department should consider procedures to revoke approval of any pierhead line that significantly departs from these standards and that is detrimental to the public interest in navigable waters.

PIER AND WHARF WIDTH AND ACCESSORY CONSTRUCTION

A maximum width of 6 feet for piers and wharves is reasonable unless the owner can demonstrate that a greater width is essential for berthing the type of watercraft to be located there. This width allows the limited use prescribed for these structures by statute, i.e. loading and unloading of cargo and passengers from watercraft [s. 30.01(5), Stats.] A 6 foot width allows persons to pass safely on a pier or wharf and provides adequate room to set aside recreational gear during loading and unloading. Incidental uses such as fishing or swimming are those which are related to navigation and do not require the physical dimensions of a pier or wharf to be altered beyond what is required to provide navigation access. The private appropriation of lake or riverbed for the construction of decks for general outdoor living activities is not incidental to navigation and is inconsistent with the public trust doctrine. Commercial shipping or industrial facilities may qualify for a wider pier or wharf if they can demonstrate a need and lack of reasonable alternatives.

A pier or wharf may include only the following accessory equipment:

- a. Seasonal boat shelters or hoists that meet NR 326 standards (must be connected to uplands by a pier).
- b. A single bench of open construction and reasonable length.
- c. Open railings or boarding ladders where required for safety.
- d. Marine rails (trolley) that allow for removal and upland storage of watercraft and that are adjacent and ancillary to a pier.

- e. White, amber or blue reflectors of reasonable dimensions. The limitation on color is to avoid confusion with other standard navigation lighting.
- f. Lighting for safety or to facilitate docking may be included and should be down-focused, non-intermittent white or yellow light (consistent with NR 326 standards for boat shelters).

Roofs, walls and advertising signs may not be included on a pier or wharf. A sign of reasonable dimensions to identify the property is permissible.

Flotation devices for piers and wharves should meet the following standards (consistent with the provisions for floats for fishing rafts in NR 324.11):

- a. They must be free of any product residue or pollutants.
- b. They must not include any container previously used to store toxic or hazardous material as defined in NR 181.12.
- c. Metallic flotation devices must be coated or painted if necessary to prevent corrosion.
- d. Flotation devices must be securely attached to the pier or wharf and maintained in a serviceable condition. Floats of expanded polystyrene beads, polyurethane or similar materials which may fragment must be coated or contained to prevent break-up. (Western District has two cases in La Crosse County Circuit Court to support this position.)

Piers and wharves should be limited to colors which are not visually obtrusive as viewed against the shoreline. Piers along developed shorelines should not be conspicuous among nearby piers and other near shore construction. Generally, white or earth tone structures are acceptable on developed shorelines.

Piers that exceed the above guidelines or contain additional accessory construction will require permit analysis under s. 30.12(2), Stats. and should be presumed to interfere with public rights in navigable waters.

Commercial shipping or industrial piers and wharves and those associated with marinas and other similar mooring facilities may include additional construction such as fueling, sanitary service or safety facilities which are essential for commercial navigation and for which an upland location is neither feasible nor practical. Facilities such as tour boat ticket booths, waiting areas, fast food stands, general merchandise sales, vending machines, tables, canopies, umbrellas, decks, etc. are beyond what is essential for navigation purposes and may not be permitted.

Related Guidance: Updates and supplements Interim Guidance of July 2, 1990

Requested by: Districts

Drafted by: M. Dresen and K. Johnson

Reviewed by: Robert Roden - WZ/6

Ralph Christensen LE/5

P. Scott Hausmann WZ/6

Bill Engfer LE/5

Michael Cain LC/5

Michael Lutz LC/5

CORRESPONDENCE/ MEMORANDUM**STATE OF WISCONSIN**

DATE: July 8, 1994 FILE REF:

TO: District Directors

Distribution: Water Regulation Staff
Law Enforcement Staff

Insertion: Ch. 75, Water Regulation Guidebook

FROM: John E. Fryatt

SUBJECT: Pier Enforcement

This guidance is being issued to assure that violations of regulations governing piers are handled in a consistent manner throughout the state. Please keep in mind that Manual Code 4112.1 identifies who is responsible for the actions described below.

PROCEDURE (PIERS)

Upon notice of violation that a pier is constructed contrary to state law (including section 30.12, 30.13, or NR-326) the following steps should be taken (note: "Notice of Violation" means a complaint by a citizen, other Department staff, or the discovery of a nonconforming pier during other related work.... for example, discovering a nonconforming pier while completing a zoning inspection or a permit application inspection on the same property or near-by property):

1. Complete an on-site investigation to determine:
 - a. why the pier is nonconforming;
 - b. if the structure in question poses an imminent danger to people or property or if it constitutes a material obstruction to navigation;
 - c. if public rights or interests in navigable water are involved; and
 - d. what measures could be taken to bring the pier into conformance with the law.
2. If the pier poses an imminent danger to people or property or is a material obstruction to navigation or is constructed in violation of conditions of any permit that may have been issued, immediate steps should be taken to abate the problem. If the owner refuses to voluntarily abate the problem, a citation under section 30.15 Stats. or a complaint under 30.12 Stats. should be issued after consultation with District Water Regulation and Zoning staff and the Warden Supervisor. The court should be asked to order abatement as part of the final disposition of the case.
3. If the complaint was brought by a citizen and the investigation indicates that there are no public interests involved, the results of the investigation will be provided to the complainant, along with a statement that the Department will take no further action unless the structure poses a danger to other riparian property owners (if so, proceed under #2 above). A copy of section 30.14 Stats. and NR 326 should also be provided to the

complainant.

4. If after investigation it is determined that no imminent danger exists but that public interests in navigable waters are involved, the following steps should be taken:

- a. Contact the owner of the nonconforming pier either in person or by phone. Explain clearly why the structure is nonconforming, what can be done to remedy the situation (may be several options: removal, reduce size, change location, etc.), and how long the owner has to correct the violation (normally we should allow at least one construction season).
- b. Follow up with a letter to the owner repeating exactly the information provided in "a" above. Ask the owner to notify you, in writing and within a reasonable period of time, what the owner intends to do (corrective action and time frame).
- c. If the pier owner refuses to do anything or fails to make necessary changes in the time allotted, notify the owner in writing that the case will be referred for prosecution and court ordered restoration or for an administrative enforcement hearing where restoration will be sought. The determination whether to issue a citation or refer the case for administrative hearing should be made jointly between the warden and the water management specialist.

Violations of any permit which has been issued for a pier should be handled in the same manner as any other violation of a Ch. 30 or 31 permit.

PROCEDURE (BOAT SHELTERS)

Boat shelters [see s. 30.01(1c), Stats., for definition] may be either permanent or may be removed seasonally from the waterway. Permanent boat shelters require a permit under s. 30.12(3), stats. Seasonally removed boat shelters are considered to be part of a pier [see definition of "pier" in s. 30.01(5)]. Procedures for seasonally removed boat shelters will generally parallel those outlined above for piers because the boat shelter and the remainder of the pier must be considered one structure and the on-site investigation will have to address the entire structure. We should not actively enforce seasonal boat shelter removal unless the boat shelter constitutes a serious problem such as a material obstruction to navigation, poses a danger to others, or was constructed in violation of a permit that may have been issued. More detailed guidance is being provided in a separate memorandum.

Reviewed by:

Mike Cain
Mike Lutz
Ralph Christensen
Bob Roden

CORRESPONDENCE/ MEMORANDUM**STATE OF WISCONSIN**

DATE: July 8, 1994 FILE REF:

TO: District Directors

Distribution: Water Regulation Staff
Law Enforcement Staff

Insertion: Ch. 75, Water Regulation Guidebook

FROM: John Fryatt

SUBJECT: Enforcement of Removal of Seasonal Boat Shelters

Section 30.12(3)(a)6, Stats., and section NR 326.055, Wis. Admin. Code, regulate the placement of permanent boat shelters in navigable waters. Section 30.01(1c) and (5), Stats., and section NR 326.055 contain provisions regarding "seasonal" boat shelters, i.e. boat shelters which do not have permits and which must be removed from navigable waters between December 1 and April 1 of the succeeding year. This guidance defines the situations under which the Department will actively pursue the removal of seasonal boat shelters.

What constitutes a seasonal boat shelter?

A seasonal boat shelter may or may not contain a boat hoist. In addition, a seasonal boat shelter may or may not have a roof or cover [see ss. 30.01(1c) and (5), Stats.]. This means, in effect, that any structure which performs the function of a boat shelter (providing a berth place for watercraft) and which does not have walls or sides (which would make it a boathouse) is subject to ss. 30.12(3)(a)6 and 30.13, Stats., and section NR 326.055, Wis. Admin. Code. This means that the typical "boat hoist" or "shore station" falls within this definition and must be dealt with in the same manner as boat shelters with roofs or covers.

What action can be taken to achieve compliance?

The owner of a boat shelter has two basic alternatives. First, the owner may apply for a permanent boat shelter permit under s. 30.12(3)(a)6, Stats. If the permit is issued, the shelter may remain in place year-round, and enforcement would normally be limited to obtaining a forfeiture or fine if the boat shelter had previously been in violation. If the permit is not issued, or the owner refuses to apply for one, then we should be seeking a court (or administrative) order for removal of the boat shelter, or a removal order and a forfeiture/fine. [Note: NR 326.055(4) contains restrictions on when a permit may be issued. For example, permits for permanent boat shelters may not be issued for most lakes or flowages under 500 acres, or for shorelines which are not "developed".] The removal of a roof or cover, or of a boat hoist, does not constitute removal of the boat shelter; the entire structure must be removed from the waterway [NR 326.055(3)(a)].

When are we required to actively enforce the removal requirement?

Seasonal boat shelters are defined by statute as part of a pier. Therefore, the provisions of ss. 30.13 and 30.14, Stats., and the applicability requirements of Ch. NR 326 must be followed. Briefly, NR 326 requires us to apply the standards in NR 326.055 when:

1. a riparian, municipality, or other person complains that a seasonal boat shelter is in violation of s. 30.12 or s. 30.13, Stats.; [MISSING PAGE]

2. If no other boat shelters already exist adjacent to the property, the permit should explicitly state that any additional boat shelters beyond the one being permitted must be seasonally removed.
3. The permit must be conditioned on seasonal removal of all boat shelters if a boathouse is subsequently constructed on the property within 75 feet of the ordinary high water mark.

These permit conditions should be enforced in the same manner as any other water regulatory permit conditions. This means we should maintain normal enforcement discretion, i.e. any significant violation should be pursued, whether or not it creates a serious safety hazard.

Please make sure that your Water Regulation and Zoning and Law Enforcement staff are aware of these requirements.

Attach.

Reviewed by:

Ralph Christensen
Mike Lutz
Bob Roden
Mike Cain

NR 326 INFORMATION SHEET

Thank you for your interest in Wis. Administrative Code NR 326, particularly as the rule relates to aesthetic impacts of boat shelters on our navigable waters. We hope this information sheet will answer most of your questions. If you have additional questions concerning this rule, feel free to call Ken Johnson at 608-266-8036.

WHAT IS THE HISTORY OF THIS RULE PROVISION?

In 1988, the Legislature passed a comprehensive rewrite of Chapter 30 which included new provisions defining temporary and permanent boat shelters and allowing the Department to create rules regulating their construction. Section 30.12(3)(c), Stats., directed the Department to "establish minimum standards to govern architectural and aesthetic features of boat shelters..." and "...to minimize the visual intrusiveness of a boat shelter with respect to the surrounding body of water and shoreline." In response to this legislative directive the Department amended NR 326 to include a provision that addresses shoreline aesthetics. Prior to 1991, there were no standards for size, shape and color of these structures and the de facto color of choice for boat shelter roofs or covers became white, a color that clearly stands out against natural shorelines.

ARE AESTHETIC CONSIDERATIONS FOR STRUCTURES IN NAVIGABLE WATERS NEW?

No! The State of Wisconsin's and the Department's consideration of aesthetics during review of waterway construction projects has a long history. The Legislature amended s. 31.06 Wis. Stats., in 1929, which allows the Department to grant permits to construct dams, and specifically required the Department to consider scenic beauty as a public right that must be protected. The Supreme Court, in a 1952 landmark decision Muench v. Public Service Commission, declared that the State had a duty to protect the public's enjoyment of natural scenic beauty as part of its navigable waters public trust responsibilities under the Wisconsin State Constitution. Almost 30 years ago when it created the Shoreland Amendment Act, the Legislature specifically included the protection of the shoreline's natural beauty as a goal and as part of the zoning ordinance standards that county governments are required to enact. The Court in 1971 again spoke to the issue of aesthetic impacts when it ruled that scenic beauty on its own is a proper basis to evaluate permit application for a boathouse. Following the direction of the Court and the Legislature, aesthetics is a consideration for the agency every time we review a permit application for construction projects in the public trust waters of the state.

WHAT COLORS ARE ALLOWED OR PROHIBITED BY THIS STANDARD?

There are no colors that are absolutely prohibited or required. Visually intrusive is defined within the rule as "clearly standing out from the shoreline background because of color or reflectivity when viewed from out on the water during the time when leaves are on deciduous trees." (Deciduous trees are those which lose their leaves seasonally, emphasis added). If the background colors are primarily green, then a solid green color complies with the rule. Likewise, if the background colors are primarily gray, then a solid gray roof or cover would comply with the rule. Further, in developed areas where the background colors are primarily white, a solid white roof or cover would comply with the rule.

WHAT'S THE BOTTOM LINE AND WHERE IS THE DEPARTMENT GOING WITH THIS RULE?

The Department's goal with this rule is to gradually have boat shelter covers change from the colors that clearly don't blend in with the background to colors that do blend in with the background. In 1991, when the rule was amended by the Natural Resources Board, the intent was to allow those people who have invested in shelter covers that don't blend in with the background to make reasonable use of their shelters. Compliance would be required when it came time to replace those covers based on wear and tear and serviceability. The Department still believes that concept makes sense and compliance shouldn't place an additional economic burden on any individual at the time of replacement.

The rule requires owners to comply by January 1, 1996. We realize that one concern with the compliance deadline is that there are many covers currently in use with a good deal of wear left on them. We are not requesting owners to dye or paint their covers to comply with this rule. The Department has no intention of

taking enforcement actions on existing covers in perfectly good condition and will enforce the visual intrusion standard only on a complaint basis. Even after complaint, we will exercise discretion and only take action in egregious situations.

Our intent is not to assume the role of aesthetic judge and jury but rather to fairly and effectively administer the laws we've been provided. While some individual choice may be restricted by this rule, it will also serve to establish minimum standards which in turn should help to protect private property values. In time, we believe that the general public and those who own land adjacent to Wisconsin's lakes and streams, will appreciate this investment in preservation of our state's natural scenic beauty.

CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

DATE: April 4, 1995

TO: District Directors

Insertion: Ch. 75 Water Regulation Handbook

FROM: P. Scott Hausmann - WZ/6

Distribution: WRZ Program Staff

SUBJECT: Program Guidance - Piers Utilized for Water Ski Shows

ISSUE SUMMARY:

This document provides guidance for evaluating permit requests for the placement of pier structures on the bed of navigable waterways for water ski competitions and shows. Specifically at issue is the allowable dimensions of the structure. We have determined that in certain situations it may be appropriate to permit a platform-like pier (called a "starting dock") to be utilized for public water ski events. This guidance discusses those limited situations when this deviation from the previously established reasonable width standard of 6 ft. (see 12/9/91 WZ Program Guidance) would be determined to be consistent with the public trust. A "reasonable use" dimensional guideline for these piers is also established in this document.

PUBLIC TRUST CONSIDERATIONS

A s. 30.12(2), Stats. permit is required for these structures since they exceed what is typically needed for loading passengers and cargo. As with all structures evaluated under s. 30.12(2), Stats., a water skiing pier or "starting dock" may not be permitted if the proposed project would interfere with public rights in navigable waters (e.g. materially obstruct navigation, be detrimental to fish and/or wildlife habitat, adversely affect water quality, adversely impact natural beauty).

In addition to addressing the public interest criteria discussed above, the applicant must demonstrate:

- the need for a platform-like structure based on the types of water skiing events which will be held,
- that the pier structure and associated use will provide significant* public recreational benefit (is not solely for private use),
 - * factors such as projected frequency of use, audience size, club affiliation (e.g. WWSF, NSSA, AWSA), shall be considered when determining if public benefit is significant
- that the events associated with the structure will be open to the public without charge or for a minimal fee,
- that the structure will be utilized solely to support water skiing events and will not be utilized as a "deck" when ski shows are not occurring.

Why This Position? Although these platform-like structures exceed what we would normally approve for individual riparian use, the fact that these ski shows have water-related entertainment value for the public at large

justifies a modified standard. We anticipate only a limited number of requests for permits for structures that would meet all of the public interest requirements listed above. This reduces the potential for any significant cumulative impacts. Limiting the allowable size of the structures will also help assure that impacts are minimized. Additionally, statutory criteria and other public interest requirements (e.g critical habitat, navigation) which might impose greater limitations on construction and placement of the structures must be determined before applying this guidance.

Do These Events Require a Wider Pier Structure? In some cases, yes. The largest events (i.e. the national tournaments) may have over 20 people on the main dock at one timeline including safety personnel to "spot" the stunts. Typically the skis are lined up in a row with the skis utilizing 4 ft. of the dock width. At the far end of the dock, a 2' wide area running the length of the starting dock is devoted to storing and handling of the ropes. This area is separated from the rest of the dock by a backdrop for safety reasons and so that the rope handling is not visible during the performance. The remaining width is the area left for accommodating safety spotters, safety personnel and used for performance routines, dances and stunts that are often associated with these shows.

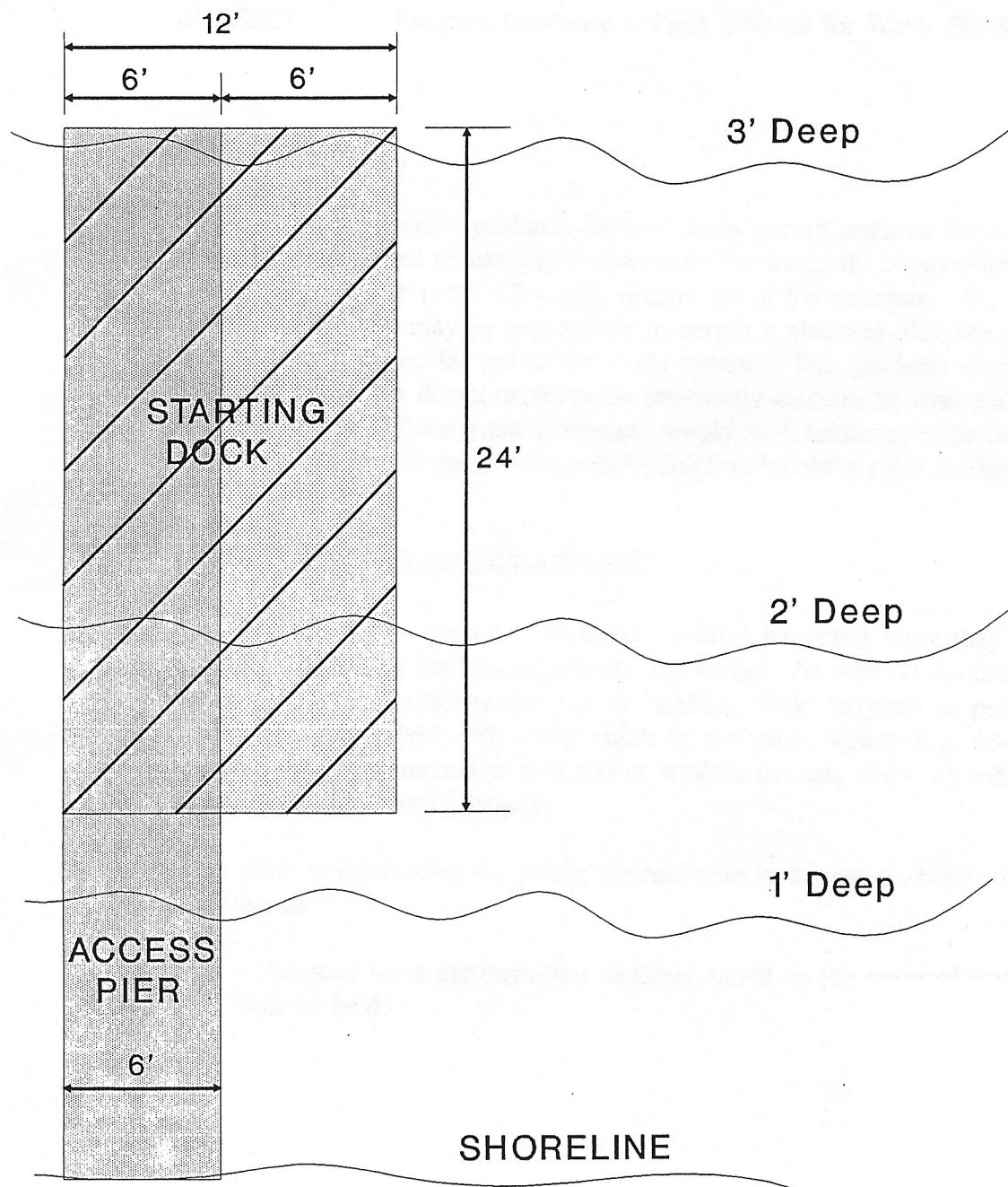
DESIGN REQUIREMENTS

The diagram on the following page shows the "reasonable use" dimensions of the starting dock (12 ft. by 24 ft.)* However only the minimum size necessary to meet the direct water ski related use should be permitted to assure that impacts on navigable waterway are minimized. Dimensions exceeding "reasonable use" should be presumed to be inconsistent with the public trust and should only be permitted if the applicant can present compelling reasons as to the need for a larger structure. The desire for additional space for theatrical and dance routines and stunts which could be performed on shore will not be considered valid reasons for a larger structure. Additionally, these larger structures should not be permitted if the project would interfere with public rights in navigable waters. The maximum access pier width of 6 ft. shown below is consistent with the established maximum pier width standard. In some cases a 4 ft. water depth may be required to accommodate take-off with the tow boat. In these situations it may be possible to angle the pier in such a way that the boat can take off in deeper water rather than permitting a structure which extends out to a deeper contour. If the pier is to be placed at an angle, this does not mean that the overall size of the structure will be allowed to exceed the established "reasonable use" guideline of 12 ft. by 24 ft.

*12 x 24 ft. is the minimum size requirement for competition rules established by the National Show Ski Association.

Any "backdrops" or other types of vertical walls and associated supporting material placed on the starting dock for events must be removable. Permits must require that this part of the structure be removed after each event to minimize visual intrusiveness.

DIAGRAM:



Related guidance: Riparian Berths and Moorings, dated 12/19/91

Drafted by: Kate Fitzgerald – WZ/6

Reviewed by: Ken Johnson – WZ/6

Michael Cain – LC/5

CORRESPONDENCE/ MEMORANDUM

STATE OF WISCONSIN

DATE: April 12, 1996

TO: District Directors

Distribution: Water Regulation Staff
Law Enforcement Staff

Insertion: Ch. 75, Water Regulation Guidebook

FROM: Scott Hausmann - WZ/6

SUBJECT: 1. complying with Standards within NR 326.04(8) which require that marina and similar facilities be open to the public. 2. Riparian status of condominiums. 3. Suggested permit conditions.

As you are aware NR 326.04(8) requires that marinas and similar moorings facilities must be open to the public.

(8) Piers associated with marinas and other similar mooring facilities shall not extend into the water from the shoreline beyond the line of navigation unless a permit is obtained under s. 30.12 (2), Stats. Such marinas shall be open to the public. Use of the facility by the public may be conditioned only on the payment of a reasonable mooring or anchoring fee.

Note: As an example, the use of such an extended pier shall not be conditioned upon membership in a private club or organization, purchase of a parcel or property, or purchase of a boat.

George Meyer's December 19, 1991 guidance on "Riparian Berths and Moorings" discusses this issue at some length and should be part of your permit analysis for high density pier developments. While that guidance still accurately articulates our thoughts on marinas, I want to be sure that our permit record reflects our consideration of and compliance with the "open to the public" requirements of NR 326.

Accordingly, I suggest that you routinely ask, document and consider the answer to these questions when a marina or similar facility is involved.

1. How has the marina historically been operated or, if it is a new marina, what is the proposed operation? ie., hours of operation, services provided, number of mooring buoys, number of slips, moorage fees, launching fees, availability to the public for access to the structures for fishing and other incidents of navigation.
2. Who will own the marina and the riparian land now and after permitting?
3. Will slips be leased to the public? If so:
 - you should request a copy of proposed lease.
 - you should inquire how the public will be notified of availability of rental initially and in the future.
 - will a waiting list be maintained? If so how and where?

- will the general public have access to the structures for fishing, sightseeing, etc., and under what terms?

Lease terms of interest include cost and length of lease. Five year leases are acceptable but we prefer seasonal or shorter periods. Leases of extremely long periods may be considered a conveyance of property under Wisconsin Law and could be prohibited under public trust law as an improper conveyance of public rights. Also, s. 30.133, Wis. Stats., prohibits the conveyance of riparian rights by easement or "similar conveyance". At some point a long term lease may become a "similar conveyance".

Reasonable fees can in most instances be determined by a comparison to "going rates" in other similar public marinas in the area. The proposed fees should be compared to mooring fees at other facilities but may include additional charges from direct ancillary services to mooring. Upland non-navigational amenities such as pools and health clubs should not be considered as justification for higher "reasonable fees". Allowing consideration of these upland amenities would violate NR 326.04(8) in effect requiring membership in a club or organization as a prerequisite to obtaining use of the pier.

If notice to the public is through advertisement, it should be in a paper likely to be read by those regularly using the lake or river system. Unmet demand should be accounted for by the applicant by maintaining a continuous first come first serve waiting list. Available slips should first be offered to people on the waiting list followed by notice/advertisement to the public.

If the slips are not leased for short terms at reasonable fees, the applicant is not entitled to a pier that is beyond levels appropriate for an individual private riparian (see the December 19, 1991 guidance referenced above). When applying the concepts in the 1991 guidance remember that the reasonable use doctrine is a concept developed in case law that requires individual analysis. Administrative law judges have recognized that our 1991 guidance is a good starting point when considering reasonable use but the test is still site specific. The following quote from a recent Administrative Hearing decision (2-SD-93-2124), reflects the common law test in Wisconsin:

What constitutes a reasonable use, under the common-law test, is a factual determination, varying from case to case, and subject to a trust doctrine concept that sees all natural resources in this state as impressed with a trust for usage and conservation as a state resource. State ex rel. Chain O'Lakes Assoc. v. Moses, 53 Wis. 2d 579, 582, 193 N.W. 2d 708 (1972).

Factors to be taken into account include: "... the subject matter of the use, the occasion and matter of its application, its object, extent and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and also the size of the stream, the fall of water, its volume, velocity and prospective rise and fall..." Timm v. Bear, (1871), 29 Wis, 254, 265.

The evaluator should determine if the individual proposal is consistent with the types of use that are commonly made of the waterbody and whether or not the expectations of the applicant to develop the proposed pier are reasonable.

If the marina has private berthing spaces at levels within a reasonable private riparian use, we will generally not be opposed to the application provided other resource concerns are not interfered with. However, we still need to verify that the pier is held by riparian owners with "real" interest in riparian uplands. Generally, condominium (dockominium) form of ownership can be acceptable provided that the condominium documents actually convey riparian interest rather than simply a cube of air or water.

If the condominium form of ownership is being used, you should request a copy of the condominium declaration as well as any articles of incorporation and bylaws of the condominium association. The condominium declaration will determine if there are multiple riparian owners (requiring multiple signatures on the application) or whatever a single condominium association can represent the interest of all unit owners. I recommend that the

condominium declarations be reviewed by legal services prior to issuing any permit to a condominium under s. 30.12, Wis. Stats.

As always, the findings of fact of the permit should appropriately document what action is being considered by the Department. As part of the Findings of Fact for marinas I suggest you include:

length of frontage, number of piers, number of slips, number for public rental, proposed terms of leases, overall purpose of proposal, determination of reasonable number of private berths for the shoreline owner.

If a permit is granted for a marina, it should be appropriately conditioned to insure that it will remain open to the public throughout the life of the structure. I suggest the following conditions be considered within the permit for any pier with public moorings:

1. You must charge no more than a reasonable fee for the slip (or mooring) rentals. Reasonable fees are moorage fees charged the general public at similar facilities in the vicinity.
 2. You must provide adequate upland access including parking for the general public, consistent with the number of slips offered for rental to the general public.
 3. You must maintain a first come first serve waiting list and advise those individuals on the list of any available slips. This waiting list must be made available to Department personnel upon request.
 4. You must initially notify the public of the availability of slips by advertising in the ----- paper for a period of not less than seven days. Thereafter, you must seasonally advertise the availability of slips in the same paper whenever the waiting list is depleted.
 5. The Department reserves even the right to further restrict the number of moorings or docks or revoke this permit if it finds that the pier is not being offered for rental to the public.
 6. The Department may modify or revoke this permit if the project becomes detrimental to the public interest.
 7. No mooring buoys beyond those expressly authorized by this permit are allowed without modification of this permit.
- (Conditions number 8 and 9 should only be used where appropriate and where the owner agrees with the restriction)
8. All portions of the pier used for public slips must also be available to the public for use (possible uses might be a promenade or for fishing) during all daylight hours.
 9. The Department reserves the right to further restrict, condition, modify or revoke this permit if it finds that the pier is not being adequately offered for use to the public.

Related Guidance: This guidance supplements the guidance by George Meyer of December 19, 1991 regarding riparian berths and moorings

Drafted by Ken Johnson - WZ/6

Reviewed by:

Mike Lutz

Mike Cain

PIERS IN WISCONSIN WATERWAYS

Riparian owners have certain privileges to the use of the water and shore - this includes the right to place a pier or wharf as an aid to navigation. Riparian rights are exercised subject to the public trust. Following is a summary of some of the law the Department of Natural Resources must apply in its regulation of piers in Wisconsin.

THE CONSTITUTION

The Public Trust Doctrine emanates from Article IX, Section 1, of the Wisconsin Constitution:

"... the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free...."

STATUTES

30.01 Definitions

"Piers" and "wharves" are specifically and narrowly defined by statute - they are structures "built or maintained for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft."

30.12(2) Permits for structures

DNR may grant a riparian a permit to place a structure: if the structure does not materially obstruct navigation, or reduce the effective flood flow capacity of a stream, and is not detrimental to the public interest.

30.13(1) Piers that don't require a permit

A riparian proprietor may place a pier without a permit, as long as the pier:

- a. doesn't interfere with public rights
- b. doesn't interfere with rights of other riparians
- c. doesn't extend beyond pierhead line
- d. doesn't violate local ordinances
- e. allows free movement of water, i.e. no formation of land on bed of waterway

30.13(3) Pierhead line

A municipal ordinance that establishes a maximum length for piers

30.131 Piers placed by non-riparians

An exception allowing easement-holders to place a pier, only if they meet a number of specific conditions.

30.133 Conveyance of riparian rights

A riparian cannot convey riparian rights to someone else, other than the right of access across a riparian's land to navigable water.

ADMINISTRATIVE CODE

NR 326, Wisc. Administrative Code - Piers and Boat Shelters in Navigable Waterways

NR 326.04 Pier Standards

- (1) pier can extend to "line of navigation" (=3-foot water depth), or length of boat or necessary draft of boat,
- (2) or pierhead line
- (3) solid piers allowed in limited cases

- (4) pier can't totally enclose a portion of a waterway
- (5) piers can't obstruct navigation
- (6) piers can't interfere with rights of other riparians
- (7) piers can't interrupt free movement of water or cause deposition on the bed
- (8) marina requirements
- (9) no screen which would trap or accumulate aquatic plants

NR 326.05 Permits required -

A 30.12 permit is required for solid piers, piers on rock-filled cribs, piers going beyond pierhead line, or piers which don't meet NR 326.04 (1) - (9) above.

NR 326.07 Riparian rights determinations

Outlines three methods for identifying the "riparian zone", where each riparian has exclusive right to place structures.

PROGRAM GUIDANCE

The Department technical and legal staff in Madison routinely provide field staff with guidance to help them interpret and apply the statutes, code and law in their work. This Program Guidance is generally issued as internal DNR memoranda, which address specific issues and provide an interpretation of the law.

December 19, 1991 Program Guidance - Riparian Berths and Moorings

This program guidance assists field staff in applying the legal doctrine of "reasonable use" in everyday permit evaluations for piers and similar structures. The guidance contains a formula for identifying the threshold number of boat slips that would generally be considered reasonable - this formula is based on the amount of frontage owned by the riparian. If a riparian's pier complies with this formula, it is likely that they are making a reasonable use of their frontage. If a riparian's existing or proposed use exceeds this formula, we should require a 30.12 permit so we can evaluate if their project will be detrimental to the public interest. This guidance memo also contains information about evaluating marinas, and considering the history of existing facilities. As with all program guidance, it is not a law or code.

CASE LAW

"Public rights" in navigable waters are broadly defined by the Courts in Wisconsin to include fishing, swimming, hunting, enjoyment of scenic beauty, and all rights of navigation. Impacts to the "public interest" in waterways therefore include impacts to fish and wildlife habitat, water quality, natural scenic beauty, navigation, public use and cumulative impacts. Riparian owners have certain privileges, but are limited by the public rights in the waters.

Sterlingworth Condominium Assoc. v. DNR, 205 Wis 2d 702(Ct. App., 1996) Proposed expansion of piers at the Sterlingworth Condominium development, on Mill Lake in Walworth County. The Wisconsin Court of Appeals upheld the Department's limitation of piers to 25 boat slips, rather than 34 as proposed by Sterlingworth. The Court of Appeals discussed the importance of considering the resource values impacted by piers and the boats associated with them, and the cumulative impacts of these structures. The Court of Appeals also affirmed the use of DNR's "pier guidance" in assessing what is a "reasonable use" when developing riparian property.

"In our opinion, the DNR, in limiting Sterlingworth's permit to twenty-five boat slips, carried out its assigned duty as protector of the overall public interest in maintaining one of Wisconsin's most important natural resources.

"The DNR's informal guidelines reconcile the common law 'reasonable use' doctrine with the statutory

limitations on a riparian owner's right to the use of a navigable water. Both presume 'reasonable use' by riparians, but allow for variations based on value and policy considerations.

"Even though the DNR's guidelines do not have the force and effect of law ... and are not controlling on the courts ... the guidelines illustrate DNR's experience and expertise in regulating piers under s. 30.12, Stats. When an agency has particular competence or expertise on an issue, we will sustain its legal conclusions if they are reasonable.... We also accord special deference to the agency's decision if it is intertwined with value and policy determinations....

"[E]very ... right which a riparian owner acquires, as such, to the waters... by his land, is restricted always to that which is a ... reasonable use, and these terms are to be measured and determined by the extent and capacity of the [lake], the uses to which it has been put, and the rights that other riparian owners on the same [lake] also have."

Nagawicka Bay Sailing Club Owners Assoc. v. DNR. This case dealt with a backlot development which proposed to place piers for 63 slips in a sensitive bog complex of Lake Nagawicka, Waukesha County. DNR's position at a 10-day administrative hearing was for a simple pier and boardwalk for access to the water. Resource issues included water quality, natural scenic beauty, sensitive area designation of the "kettle", threatened and endangered species, and motorboat disturbance. The initial hearing included participation of citizens opposed to the project. The Administrative Law Judge affirmed DNR's position, and this was upheld by the Circuit Court and Court of Appeals.

ADMINISTRATIVE HEARINGS

Application of Steven Frisch to Place a Boardwalk and Pier on the Bed of Nagawicka Lake, Waukesha County. This case involved a parcel of land immediately south of the Nagawicka Bay parcel which was owned by the same developer. The judge ruled in this case that the lake area involved was so fragile that no pier was authorized! This case was appealed, but no judicial decision was ever rendered since the parcels were purchased by a local conservation group, with DNR assistance, to preserve the area.

Application of Wagner's Port Sand Resort and Campground for a Permit to Place a Marina on the Bed of Big Sand Lake, Burnet County. This case involved an application and an enforcement action in a case where the campground owner applied to moor 82 boats at six separate pier structures, along 1068 feet of shoreline. The owner had continually expanded the number of boats along his shoreline over a period of years. Many neighbors objected, and 52 neighbors spoke in opposition at the hearing. DNR proposed a maximum of 32 slips (22 seasonal leases and 10 slips for daily use). The judge adopted this recommendation, and also accepted DNR's recommendation that the owner not pull boats onto the shore and store them below the OHWM, due to impacts on near shore vegetation.

CURRENT ISSUES

Dockominiums

Public water is held in trust by the state. Sale of a "parcel" of public water for use as a boat slip is unlawful. Sale of a condominium unit (residential or otherwise) that includes riparian land and the guaranteed right to place a pier at a designated location is not unlawful, subject to the reasonable use doctrine and protection of public rights.

Oversized piers/decks over water

Section 30.01 clearly defines that piers and wharves are structures "built or maintained for the purpose of providing a berth for watercraft or for loading or unloading cargo or passengers onto or from watercraft." Any structure which is built or maintained for any other use - such as a deck or storage area over the water - does not

qualify as a pier or wharf! Oversized piers can create a barrier to public use of that portion of a waterway, and can harm the sensitive shallow aquatic environment which is so important for the fish and wildlife habitat of our lakes and streams. Piers used as decks constitute an encroachment of a private use onto public waters. DNR's 6-foot maximum pier width guideline provides the ability to dock boats, load and unload boats, and it meets ADA specifications. It also tends to limit the ability to use the pier for non-navigational purposes. The six-foot width is not found in statute or code - it comes from DNR's experience and interpretation of statute, code and case law for what structures are allowed in our public waterways.

Solid Piers

Solid piers require a permit pursuant to 30.12, and are increasingly common proposals on the Great Lakes shorelines. Cumulative impacts to aesthetics, littoral zone movement and near-shore habitat are some of the major concerns with these structures.

BEFORE THE
STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Application of Sea View Estates Beach Club,
Inc., for a Permit to Construct a Pier on
the Bed of Pewaukee Lake, Town of Pewaukee,
Waukesha County, Wisconsin

3-SE-95-418

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Pursuant to due notice hearing was held on June 27 and July 11, 1996 at Waukesha, Wisconsin before Jeffrey D. Boldt, Administrative Law Judge (the ALJ). The parties submitted written closing arguments, the last of which was received on August 29, 1996.

In accordance with secs. 227.47 and 227.53(1)(a), Stats., the PARTIES to this proceeding are testified as follows:

Sea View Estates Beach Club, Inc., by

Patrick J. Hudec, Attorney
2100 Church Street
East Troy, WI 53120

Department of Natural Resources, by

Debra Johnson, Attorney
P. O. Box 7921
Madison, WI 53707-7921

Michael and Lauren Zimmerly, by

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P.O. Box 92900
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FINDINGS OF FACT

1. Sea View Estates Beach Club, Inc. (the applicants or the Club), N27 W26748 Lauderdale, Pewaukee, Wisconsin, 53072 applied to the Department of Natural Resources for a permit to place a pier on the bed of Pewaukee Lake. The proposed project is the placement of a 195 foot long pier accommodating 25 boat slips. The pier has been in place, though not at the proposed size, since the early 1960's. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.02, Stats.

2. The applicants own real property located in the NW 1/4 of the NW 1/4 in Section 17, Township 7 North, Range 19 East, Town of Pewaukee, Waukesha County. The above-described property abuts Pewaukee Lake which is navigable in fact at the project site.

The applicants are a group of residents of a subdivision which does not abut Pewaukee Lake. No portion of the subdivision itself affords the applicants with any riparian status. However, the applicants also jointly own the small riparian parcel described above which includes 60 feet of lake frontage. It is ownership of this small parcel that affords the applicants with such riparian rights as they possess.

3. The applicants propose to authorize by permit a pier which has been placed in the water without specific permit authority for many years. There is no question that the proposed pier extends well beyond the line of navigation and therefore requires a permit under department policy and secs. NR 326.04(i) and NR 326.03(3) Wis. Admin. Code. The line of navigation, representing the three foot depth contour, exists at approximately 60 to 68 feet below the ordinary highwater mark. The water depth at the end of the proposed and existing structure is closer to 4.5 to 5 feet. There is no basis in the record for determining that a depth of water greater than 3 feet was required to moor boats at the Sea View pier. Accordingly, a permit was and is required for maintenance of the any pier which extends more that 68 feet into the water.

4. The pier has been placed well beyond the line of navigation for many years without the required permit. Aerial photographs reviewed by the Department indicate that the pier was approximately at or near the line of navigation in 1970. According to the Department, by 1975 it had grown to 110 feet, and by 1995 the pier was fully 199 feet long and moored 17 to 20 slips. (Exhibit 17) There is no factual basis in the record to support the claim of the applicants that the pier was somehow "grandfathered" with respect to the need for a sec. 30.12, Stats. permit. Instead, the record indicates that the large pier has been placed at the site for many years without the required permit.

5. The purpose of the pier is to continue to provide Subdivision residents with boatmooring facilities. The pier also incorporates a near-shore swimming area. No boats are moored along the southwest near-shore area, which is reserved for swimming. The record was clear that some boats could be moored in this area, thereby decreasing the area of public waters occupied by the pier structure. The applicants own by far the smallest piece of riparian property in the area and place by far the biggest pier in public waters of any neighboring properties. (See: Exhibit 8)

6. The Department has established a non-binding Program Guidance (the guidance) to interpret the public interest standard relating to the "reasonable use" of riparian property. (Exhibit 14) The guidance is not applied with the force of law but is used in part to establish a threshold to determine if a riparian has exceeded the "reasonable use" of riparian mooring privileges. This limitation on the use of a given riparian zone is related to

the amount of water frontage owned by the riparian and also to whether the pier structure provides any public benefit in the form of rental slips made available to the public. (Id.) Under the program guidance, the applicants, riparian owners of just 60 feet of lake-front property, would be entitled to just two or three pier slips. The pier provides no benefit to the non-riparian public, as would occur from the operation of a public marina.

The guidance reads as follows with respect to Existing Berthing Facilities:

Existing, berthing facilities which exceed "reasonable use" guidelines may continue to rely on any permit which authorizes specific construction. This remains true unless significantly changed conditions and resulting effects on public rights require permit revision (the Department maintains continuing jurisdiction over such projects). The Department may apply "reasonable use" criteria and require modification or commence an enforcement action against any existing facilities (particularly those undergoing major repair) for which a permit has not been issued if it finds that current statutory requirements have not been met. Generally we will not hold existing facilities to the same "reasonable use" guidelines which we will apply to new proposals since, to some extent, they may have established some limited interest in use of existing facilities. (Exhibit 14, p. 5)

The Department's position in this matter is very hard to reconcile with its policy as articulated in its guidance document. The pier has not been validly permitted. It has never moored as many as 25 boats on public waters. It would be fundamentally unfair to riparians who have obtained the required permit to allow greater privileges to an unpermitted facility, however long it has been placed in public waters. However, given the longstanding placement of the pier, it would also be unfair to restrict the pier to the three slips which the guidance would allow for construction of a new pier.

Balancing the rights of the public with the rights of the private riparians, a pier containing 12 slips and extending no more than 110 feet is at the limits of a reasonable use of this small riparian tract. Even when the pier is so reduced, the Subdivision will continue to place the largest pier in the area on the smallest riparian tract.

7. Several neighboring riparians testified that cramming so many pier slips into the small riparian zone lead to conflicts in and around the site, including safety hazards. (Gutowski, Foch, Zimmerly) There is no question from the record that allowing so many boats to be moored on this small riparian tract has led to incursions into the Zimmerly riparian zone, including specifically areas behind the line of navigation which the common law requires be made available to a riparian. The Zimmerlys have to some extent aggravated these problems by moving their pier closer to the lot line between the two properties. However, this appears to have been motivated by a reasonable desire to protect small children seeking to make use of near shore areas in the face of excessive boat traffic making use of the Club pier. The videotapes offered by the Zimmerlys (Exhibits 25 and 51) well document the congestion at the site and the interference with the use of the Zimmerly riparian zone. Expansion of the existing facility to moor five more boats would plainly violate sec. NR 326.04(6), Wis. Admin. Code. The existing intensive use of the shoreline interferes with the riparian rights of the Zimmerly riparian tract.

8. Waukesha County has adopted an "anti-pyramiding" provision in connection with the Waukesha County Shoreland and Floodplain Protection Ordinance adopted June 25, 1970, and Amended November 14, 1995. (Exhibit)

Section 2.02(54a) of the Ordinance defines "pyramiding" as:

"The act of obtaining or providing access to public bodies of water across private lots or lands in a manner which increases the number of facilities which have access to that water to a degree greater than what would occur with individual riparian owners having individual lots fronting on the water. The effect of pyramiding is to funnel backlot development from offshore lots or residences via a narrow parcel of land to provide access to the water. Publicly owned access points shall not fall within this

definition."

Sea View argues that the pier is not subject to regulation because Sea View began placing the pier before the Ordinance was enacted. Section 3.15(1) of the Ordinance provides that:

"The existing lawful use of a building or premises at the time of the enactment of [the Ordinance] or any amendment thereto may be continued although such use does not conform with the provisions of [the Ordinance] for the district in which it is located, subject to conditions hereinafter stated. (Emphasis added.)

While section 3.15 of the Ordinance provides that an existing, nonconforming use of structures and lands can continue, this section also provides, pursuant to sec. 3.15(2)(B)1, that "[n]o such use shall be expanded or enlarged." Sections 3.04a(2), 3.15(1) and 3.15(2)(B)1 were enacted on June 30, 1970. Section 21.07. Therefore, assuming the pier was a legal, nonconforming use pursuant to the Ordinance, Sea View could only maintain the pier in the same size and configuration that existed on June 30, 1970.

The record is unclear as to exactly how large a pier was maintained by Sea View in June of 1970. The aerial photograph reviewed by the Department suggests a modest structure, perhaps 70 feet long in 1970. (Exhibit 17 and 29) However, the applicants presented a family video tape said to show the installation of the pier in the spring of 1970. The pier installed in the videotape is considerably longer than 70 feet, although its exact length is unclear from the record. Club records put the pier length at 230 feet in 1975. What is abundantly clear from the record is that the applicants have never moored 25 boats on the public waters of Pewaukee Lake, as they seek to do in the instant application. According to the Club's own review of its own files, the pier moored no more than 12 boats in 1975. (Exhibit 19) One slip was added over each of the next three years, so that the pier moored no more than 15 boats as late as 1978. (Id.) The subdivision residents have dramatically increased their demands on public waters in terms of the numbers of boats occupying space on public waters since the enactment of the Ordinance. This represents a violation of both the letter and spirit of the anti-pyramiding Ordinance.

9. Approval of the instant permit application seeking 25 pier slips on a pier 199 feet long would be detrimental to the public interest in navigable waters in three distinct ways. First, the pier would be excessive in relation to the amount of riparian frontage owned and would accordingly violate the common law "reasonable use" doctrine. Second, approval of such a congested pier on such a small riparian tract would have a detrimental impact on neighboring riparians and would thus violate sec. NR 326.04(6), Wis. Admin. Code. Third, the Waukesha County anti-pyramiding Ordinance reflects the public interest in navigable waters as adopted by the citizens of the County through their elected public officials. Since 1970, the County has sought to limit exactly the type of development reflected at the site, namely residents of a backlot subdivision owning a small riparian strip and then seeking riparian rights reflecting the size of the subdivision more than the size of the riparian tract they own. To authorize more than 12 slips at the site, which is the best estimate of the number of boats moored at the site upon adoption of the Ordinance, would be detrimental to the purposes of the Ordinance as expressed Section 1.02 of the Ordinance. More fundamentally, the doubling of the number of boats moored at the site at the time of adoption of the Ordinance would be detrimental to the purposes of the public trust doctrine to preserve and protect public waters.

10. The proposed structure will not materially obstruct existing navigation on Pewaukee Lake and will not be detrimental to the public interest upon compliance with the limiting conditions of this permit. The existing longer pier is not a significant material obstruction to navigation, given the usual pattern of boat traffic. (Drake) The project area is in a cove which to some extent mitigates the protrusion into the waterway. Some small craft, including canoes, would be forced farther out into the waters at the 200 foot length. However, taken as a whole, the evidence supports a finding that the existing pier is not a material obstruction to navigation on Pewaukee Lake.

11. The applicants are financially capable of constructing, maintaining, monitoring or removing the structure if it should be found in the public interest to do so.

12. The proposed structure will not reduce the effective flood flow capacity of Pewaukee Lake upon compliance with the conditions in the permit.

13. The proposed structure will not adversely affect water quality nor will it increase water pollution in Pewaukee Lake. The structure will not cause environmental pollution as defined in sec. 144.01(3), Stats., if the structure is built and maintained in accordance with this permit.

14. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

CONCLUSIONS OF LAW

1. The applicants are riparian owners within the meaning of sec. 30.12, Stats.

2. The proposed facilities described in the Findings of Fact constitutes a structure within the meaning of sec. 30.12, Stats.

3. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the construction and maintenance of said structure subject to the conditions specified.

4. The placement of piers and other structures in waters is not absolute, but is subject to the common law doctrine of "reasonable use". State ex rel. Chain O'Lakes Assoc. v. Moses, 53 Wis. 2d 579, 582, 193 N.W.2d 708 (1972). This limitation on the right to place a pier in public water is related to the extent of water frontage owned by the riparian. Rondesvedt v. Running, 19 Wis. 2d 614, 621, 121 N.W.2d (1963). To allow more than 12 boats to be moored at this site would violate the reasonable use of this small riparian tract.

5. Chapter NR 326 Wis. Admin. Code applies to the instant permit application made June 5, 1995.

6. The existing pier and the proposed expansion of the number of boats moored at the site would "interfere with the rights of other riparians" within the meaning of sec. NR 326.04(6), Wis. Admin. Code,

7. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Admin. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicants, a permit under sec. 30.12, Stats., for the construction of a structure as described in the foregoing Findings of Fact, subject, however, to the conditions that:

1. The authority herein granted can be amended or rescinded if the structure becomes a material obstruction to navigation or becomes detrimental to the public interest.

2. The permittees shall waive any objection to the free and unlimited inspection of the premises, site or facility at any time by any employee of the DNR for the purpose of investigating the construction, operation and

maintenance of the project.

3. A copy of this permit shall be kept at the site at all times during the construction of the structure.
4. The permit granted herein shall expire three years from the date of this decision, if the structure is not completed before then.
5. The permittees shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
6. The permittees shall notify the Water Management Specialist, Marty Johnson, not less than five working days before starting construction and again not more than five days after the project has been completed.
7. Any area disturbed during construction shall be seeded and mulched or ripped as appropriate to prevent erosion and siltation.
8. No heavy equipment shall be operated in the lake at any time unless written notification is made to the Water Management Specialist, Marty Johnson, at least five working days in advance.
9. The pier length shall not extend more than 110 feet lake-ward of the ordinary highwater mark. No more than 12 boats shall be moored at the pier at any time.
10. Acceptance of this permit shall be deemed acceptance of all conditions herein.

This permit shall not be construed as authority for any work other than that specifically described in the Findings of Fact.

Dated at Madison, Wisconsin on October 29, 1996.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within

twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file With the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49 (3) , Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.

DATE:

FILE REF: Ch. 75 Water Regulation Handbook

TO: Water Regulation Handbook Holders

FROM: Paul Cunningham, FH/4
Mary Ellen Vollbrecht, FH/6

CC: FH Board

SUBJECT: Program Guidance Concerning Permit Application Determinations for Water Ski Jumps and Platforms

Issue

Water skiing, including competition and exhibition skiing, is clearly an incident of navigation that can also have varying impacts on public rights in navigable waterways. There are approximately 30 competition/exhibition clubs, statewide. Many of these clubs practice and perform weekly using ski platforms and jumps. In the past, these performance ski platforms and jumps required a Chapter 30 permit. New Legislation (1997 AB 100, ACT 27) allows riparians to place water ski platforms and ski jumps in navigable waters without a permit under limited conditions. Field staff need guidance on how to implement S. 30.135; specifically, how to determine if a ski jump/platform (existing or proposed) requires a permit application, so impacts to the public interest can be evaluated and protected.

Authority

30.135 Regulation of water ski platforms and jumps. (1) WHEN PERMIT REQUIRED. (a) A riparian proprietor may place a water ski platform or water ski jump in a navigable water way without obtaining a permit if all of the follow requirements are met:

- 1. The platform or jump does not interfere with public rights in navigable waters.*
- 2. The platform or jump does not interfere with rights of other riparian proprietors.*
- 3. The platform or jump is located at a site that ensures adequate water depth and clearance for safe water skiing.*

(b) If the department determines that any of the requirements under par. (a) are not met, the riparian owner shall submit a permit application to the department [...].

There have been a number of appellate court decisions which address the relationship between the public rights in a waterway and uses by riparian owners and groups which desire to use surface waters for activities such as water ski performances. The two most pertinent cases are *Sterlingworth v. DNR*, 205 Wis. 2d 702 (Ct. App., 1996) and *State v. Village of Lake Delton*, 93 Wis. 2d 78 (Ct. App., 1978).

Sterlingworth provides a recent summary of three key concepts -- reasonable use, cumulative impact, and the role of agency guidance. **The Court stated:**

“[E]very ...right which a riparian owner acquires, as such to the waters, by his land, is restricted always to that which is a reasonable use, and these terms are to be measured and determined by the extent and capacity of the [lake], the uses to which it has been put, and the rights that other riparian owners on the same [lake] also have.”

Whether it is one, nine, or ninety boat slips, each slip allows one more boat which inevitably

risks further damage to the environment and impairs the public's interest in the lakes. [...] For this very reason, the consideration of "cumulative impact" must be taken into account."

"Even though the DNR's guidelines do not have the force and effect of law... and are not controlling on the courts... the guidelines illustrate DNR's experience and expertise in regulating piers under s.30.12, Stats. When an agency has particular competence or expertise on an issue, we will sustain its legal conclusions if they are reasonable... . We will also accord special deference to the agency's decision if it is intertwined with value and policy determinations... ."

The impacts as discussed in *Sterlingworth* must be balanced in view of Court of Appeals decision in **Village of Lake Delton**, where the court reviewed a local ordinance authorizing use of surface water by a water ski show and a challenge of such use by individuals who desired to exercise their public right to fish at the same time as the show was scheduled. **The Court stated:**

"In our view a regulation [here, the local ordinance authorizing the show] which apportions the use of a given space of water to the single use and user which the space can reasonably accommodate at a single time reflects the obvious law of physics that two objects cannot be in the same place at the same time. While from one perspective such a regulation confers a temporary privilege on the user, from another it merely provides a mechanism through which the user may exercise his right, held in common with all citizens, to use public property for a legitimate purpose. The issue in any event does not turn upon the elusive and semantical distinction between "rights" and "privileges." For the appropriate questions, as the Supreme court has made clear in the cases previously discussed, are whether the regulation has a legitimate public purpose and, if so, whether the means it employs to accomplish the purpose are reasonable. Under the circumstances of this case, we conclude that both questions must be answered in the affirmative."

Rationale

Water skiing, including recreational and exhibition skiing, is clearly an incident of navigation and can provide public benefit. Ski jumps/platforms (like other navigational structures) and their use can: impact fish and wildlife habitat; resuspend sediment causing water quality impacts; affect natural scenic beauty; negatively affect other navigation; and affect other riparians. Statute and common law indicate intent to balance these rights.

GUIDANCE FOR EXISTING WATER SKI STRUCTURES

An existing jump or platform with a permit

Existing water ski jumps or platforms which exceed the thresholds in the guidance may continue to rely on any permit under chapter 30, Wis. Stats., that authorized their construction. If a complaint is received about an existing structure, the site should be reviewed to see if permit conditions are met and if physical or ecological conditions have changed. If conditions have changed so that continued placement of the structure results in a new public interest impact, work with the permittee and complainant to amend the permit to include conditions to address the public interest impact. In rare circumstances a hearing could be scheduled to determine if a public interest impact exists that would require revocation of the permit. The significance of the impact should be balanced with the equity of long term placement of the structure. If permit conditions are met and no change has occurred - or if review determines that a permit would no longer be required for the structures - report findings and conclusion (that no further action is required) to the complainant and the permittee.

A proposed change to a permitted jump or platform

Apply the following guidance to see if as a result of the modification a permit is needed. If a permit is needed, the rule would be applied to establish the contents of the public notice and to assess whether any resulting objections are substantive. Review the site to assess existing public interest functions in the waterway at the site

and to determine whether impacts to the public interest would occur as a result of the modification (including review of any written objections) in order to grant the permit or refer it for a hearing.

An existing jump or platform without a permit

The rule or the following guidance would be applied if a complaint is received to see if a permit is needed. If a permit is needed, the rule would be applied to establish the contents of the public notice and to assess any resulting objections. Review the site to assess existing public interest functions in the waterway at the site and to determine whether impacts to the public interest would occur as a result of the modification (including review of any written objections) in order to grant the permit or refer it for a hearing. If no permit is needed, report findings and conclusion (that no further action is required) to the complainant and the party placing the structure.

A new jump or platform

Apply the following guidance to determine if a permit is needed. If a permit is needed, the rule would be applied to establish the contents of the public notice and to assess whether any resulting objections are substantive. Review the site to assess existing public interest functions in the waterway at the site and to determine whether impacts to the public interest would occur as a result of the modification (including review of any written objections) in order to grant the permit or refer it for a hearing.

This guidance section helps guide decisions of when we would require a permit application. The determination is intended to be rapid - NOT a complete analysis to answer whether a permit will be issued. Factors will be similar, but permit decisions will rely on more rigorous information, examination, and analysis to ensure recognition of all rights, public and private. Specifically, this guidance identifies criteria or conditions upon which: 1) the platform or jump may interfere with public rights in navigable water; 2) may interfere with rights of other riparians; and 3) is a site that does not ensure adequate water depth and clearance for safe skiing.

Water ski platforms and jumps can be placed without a permit if **all** of the following five conditions are met: 1) They are not an impediment to navigation or its incidents; 2) They do not impact habitat, cause or increase shore erosion, degrade water quality, or disturb fish and wildlife; 3) They do not harm natural scenic beauty; 4) They do not have significant, cumulative impacts; and 5) They do not interfere with the rights of other riparians.

The remainder of guidance details the factors to be considered and when impacts are likely. These factors are detailed in the form of a questions. The primary questions (**in bold**) are intended to help staff make rapid determinations using readily available information. A "Yes" answer to **any one** of the "bolded" questions (primary factors) will require a permit application. The "secondary" questions we've provided can also help you determine the need for a permit application, but are not required.

Public Interest and Riparian Rights in Navigable Water: Determination of Potential Interference

1) Impacts on navigation and incidents of navigation

Will use of the structure create safety problems? **Is the site within 100 feet of a marked swimming area, public boat landing, dock, anchored raft, pier, or buoy restricted area? (Ch. 70-26)** ss. 30.66 and 30.69 forbid water skiing within 100 feet of an anchored occupied boat, marked swimming area, public boat landing, dock, raft, pier or buoy restricted area.

Does the structure materially obstruct navigation? **Is the size, color, shape, and lighting of the ski jump detrimental to safe day and night-time navigation (Ch. 70-26)?**

Does the size of the ski platform exceed the Department's reasonable use guideline of (to be determined after further consultation with WWSF) (Ch. 75, 4/4/94 Memo--Piers Utilized for Ski

Shows)?

Are there significant conflicts (at the site or lake-wide) with other recreational users of the waterway? Where the initial review indicates that permit conditions (e.g. hours of operation, public access to the platform when not in use if on public land, etc) will avoid or minimize public interest impacts, then a application should be required so that permit conditions can be established and applied. Quality recreational experiences are most often obtained by "not managing for all boating experiences in one ecosystem " but by diversifying recreational settings. Many recreational users of certain waters have come to expect a recreational experience in quiet and less disturbed lake or river. Likewise, certain waters (or areas) are typified by more active recreational activities.

2) Impacts on Littoral Zone Habitat, Flora, and Fauna -- Boating can have negative impacts in shallow areas, specifically sediment and nutrient re-suspension, decreased water clarity, shoreline erosion, physical disturbance of fish and wildlife, and loss of aquatic plants. Permit applications will be required where structures and their associated activities are located in areas that: 1) are susceptible to sediment resuspension; 2) contain extensive rooted aquatic plant beds; 3) are inhabited by threatened or endangered species; 4) are designated as a sensitive area; 5) are spawning or nursery habitats.

Is the pull zone adjacent to the starting platform located in water depths less than 7-8 feet and where the dominant substrate (upper 2 inches) is composed primarily fine sediments (grain size less than sand)? This question does not apply to riverine settings where substrates are composed of sand or larger grain sizes (cobble, gravel, etc). For standing waters (lake, flowages, and backwater areas), factors such as depth and substrate will be considered. Fine sediments, composed mostly of silts, clays, or loose organic material are more easily resuspended than sands, gravel, or cobble substrates. Propellers from outboard engines create turbulence and wake that can impinge upon bottom sediments at depths down to ten feet. The extent of disturbance depends upon propeller size, speed of operation, draft of the boat, and sediment characteristics.

Does the pull zone adjacent to the starting platform (to be defined by WWSF) have more than 25% of its area covered by rooted aquatic plant growth? Motor boats reduce plant growth primarily through scouring of the sediment substrate and direct cutting. Motorboat exclosure experiments conducted by DNR researchers have found roughly three times the plant biomass in motorboat-excluded plots compared to plant biomass in plots exposed to motorboat activity.

Does existing survey information indicate that threatened or endangered species are found near the site?

Is the structure and its associated activity located in or near spawning/nursery habitats or designated sensitive areas?

Is the structure located in an area where exotic plants which spread by fragmentation of leaves and shoots exist (i.e. eurasian water milfoil)? Direct damage of plant shoots from propeller scour and cutting can facilitate the spread of milfoil to new sites.

Will the increased boating activity associated with the structure result in a significant direct disturbance to fish or wildlife?

3) Impacts on Natural Scenic Beauty

Is development near the site less than the NR326 standard? or Are agreements with local units of government absent (city and county park areas)? (Developed shorelines are those where there are at

least five principal structures including at least one on the applicants property which are located within 500 feet of the proposed shelter site and are visually intrusive as viewed from the water, NR326.055(4)(f)]. Less developed areas of the lake or less developed lakes in general will experience greater impacts on natural scenic beauty from the structure and its activity than other more developed areas or lakes.

Will the structure and the increased associated boating significantly lower natural scenic beauty near the area or lake-wide? Consider compatibility--the relationship between the structure, its associated activity and the other adjacent land/water uses. Is this activity appropriate for this setting? Consider the Impact of additional structures on the natural beauty of areas that have already experienced some degree of development.

4) Cumulative impacts--Cumulative impacts of increased power boating can result in lake-wide changes. These criteria can be used to assess the significance of the structure (and associated activity) to cumulative lake impact. Water chemistry, lake morphometry, and lake size (or areas of lakes) are sufficient evidence for potential lake-wide impacts and may justify the need for a permit application. Sponsor, events, and use of the structure are additional factors that help determine the potential for cumulative impact of similar decisions.

What is the depth and size of the waterbody? **Is the lake <1,000 acres and more than 80% of its surface area shallower than 10 feet in depth (or mean depth of the lake 12 ft.)? OR For lakes 500-1,000 acres is more than 50% of its surface area under 10 feet deep.** Impacts of motor boats are most prevalent in small shallow lakes, or shallow areas of deep lakes.

What are the water chemistry and sediment conditions? Boats have the potential to stimulate algal growth in lakes with soft-water and easily suspended sediments. Decreased water clarity can negatively impact lakes in many ways. Aside from the decreased enjoyment by lake users, reduced water clarity can limit the light available to submersed aquatic plants and upset the food web dynamics in lakes by affecting behavior or reproductive success of invertebrates, fish, and waterfowl. Numerous studies have documented increased turbidity or suspended solids directly related to motorboat activity. Impacts of motor boats will be greatest on small, shallow lakes with soft-water sediments (high clay, low calcium).

What is the nutrient condition of the waterbody? Consider the nutrient gradient, particularly for shallow lakes. The nutrient gradient represents a continuum of nutrient input rates. The possibility of rapid transition between alternative states of habitat (macrophyte- or phytoplankton dominance) occurs through the middle of the gradient. At low nutrient input rates, levels are not sufficient to support extensive macrophyte growth. At high nutrient input rates, extreme algal turbidity prevents development of submersed macrophytes. Submersed macrophytes attain their greatest importance through the middle of the nutrient loading gradient. Over time, water quality may suffer as sediment disturbance and plant bed destruction increase nutrient inputs to the lake and fuel algal growth. At sufficient levels, lake-wide impacts can occur; a shallow lake can abruptly shift from macrophyte dominance to algae dominance. Shallow lakes with moderate-high nutrient conditions are most vulnerable to lake-wide habitat changes (alternative stable states).

Does the structure and its associated use provide only private benefits (not a recognized competition/exhibition ski organization)? *While examination of public benefits (or lack of) associated with the structure in of itself is not test of interference with the public interest, analysis of cumulative impact of "non-club/individual riparians" indicates interference with the public interest.* Factors such as projected frequency of use, audience size, club affiliation (e.g. Wisconsin Water Ski Federation, National Ski Show Association, American Water Ski Association) shall be considered when determining if benefit is significant. Are viewing events associated with the structure accessible to only private individuals or unreasonable fees charged ?

Is the structure being utilized as a "private deck" when ski shows are not occurring? Indicators include furniture, angling equipment, enclosing railings.

5) Impacts on Other Riparians

Are the structures located outside the "applicant's" riparian zone of influence? Or are riparian approvals (signatures) adjacent to the defined performance area (to be defined in consultation with WWSF) absent? Neighbor sign-off in for a described boat traffic pattern within 200' of the shore.

Are there specific objections from neighbors that detail how the ski jump/performance platform, and associated uses interfere (ie. hours of operation, etc.) with other riparians? *(Depending on the above criteria we may be able to eliminate this question.)*

Will increased boating activity in the area associated with the structure result in significant shoreline erosion above the ordinary high water mark? Consider site location, lake size, lake orientation, fetch distance, etc.

In summary, water ski jumps and platforms may be placed without a permit when multiple conditions relevant to navigation, features of the littoral zone (and its flora and fauna), natural scenic beauty, considerations of cumulative impact, and considerations of other riparians are all met. A summary of those conditions are as follows: 1) The site is a safe distance from swimming area, boat landings, docks, rafts, piers, or buoy restricted area; 2) the structure allows for safe navigation (size, lighting, marking); 3) for lakes the structure is located in an area that is capable of supporting intense boating (> 7-8 feet with sand or larger predominate substrates); 4) the structure is not in or adjacent to sensitive areas or spawning and nursery areas; 5) the structure is located adjacent to developed shorelines, or along areas where agreements with local municipalities exist; 6) the structure is not located on smaller shallow lakes (< 1,000 acres and mean depth <12 feet); 7) the structure provides for public benefit; 8) the structure is not utilized as a private deck; and 8) the structure is within the applicant's riparian zone of influence. Field Staff will use the attached water ski jump/platform analysis checklist to assist interested parties to determine whether a permit application is required.

Related Guidance: Piers Utilized for Water Ski Shows-4/4/95
Handbook CH. 70-26, Water Ski Jumps

Attachment: Water Ski Jump/Platform Analysis Checklist

Drafted by: Paul Cunningham, FH/4 Mary Ellen Vollbrecht, FH/6
Reviewed by: Mike Cain, LC/5

Water Ski Jump/Platform Analysis Checklist will guide decisions when the Department would require a permit **application** for a proposed or existing structure. This checklist is not intended to be a complete analysis to answer whether a permit will be issued. A "Yes" answer to **any one** of the primary factors will require a permit application. The secondary factors can also help evaluate the need for a permit application, but are not required.

CATEGORY	PRIMARY (Bold Font) and SECONDARY (Regular Font) FACTORS	Y E S	N O
Navigation	Is the site within 100 feet of a marked swimming area, public boat landing, dock, anchored raft, pier, or buoy restricted area? (Chi. 70-26)		
	Is the size, color, shape, and lighting of the structure detrimental to safe day and night-time navigation (Ch. 70-26)?		
	Does the size of the ski platform exceed the Department's reasonable use guideline (20'X36')?		
Littoral Zone Habitat, Flora, and Fauna	Is the pull zone located in <7-8 ft and the dominant substrate (upper 2") composed of fine sediments (<sand size) ? This question does not apply to riverine settings where the bottom is composed of substrates of sand or larger grain sizes (gravel, cobble).		
	Does the pull zone have more than 25% of its area covered by rooted aquatic plant growth?		
	Does existing survey information indicate that threatened or endangered species are found near the site?		
	Is the structure located in or adjacent to a designated sensitive area or spawning/nursery habitat?		
Natural Scenic Beauty Cumulative Impact	Is development near the site less than the NR326 standard? or Are agreements with local units of government absent? (Developed shorelines are those where there are at least five principal structures including at least one on the applicants property which are located within 500 feet of the proposed shelter site and are visually intrusive as viewed from the water, NR326.055(4)(f)).		
	Is the lake <99 acres; or is the lake 100-499 acres and >50% of its surface area under 10 feet deep; or is the lake 500- 1,000 acres and at least 80% of its surface area less than 10 feet deep (or mean depth of the lake 12 ft.)? This question does not apply to riverine settings where the bottom is composed of substrates of sand or larger grain sizes (gravel, cobble). Impacts of motor boats are most prevalent in small shallow lakes, or shallow areas of deep lakes.		
	Does the structure and its associated use provide only private benefits (not a recognized competition/exhibition ski organization)? While examination of public benefits (or lack of) associated with the structure in of itself is not test of interference with the public interest, analysis of cumulative impact of "non-club/individual riparians" indicates interference with the public interest. Factors such as projected frequency of use, audience size, club affiliation (e.g. Wisconsin Water Ski Federation, National Ski Show Association, American Water Ski Association) shall be considered when determining if benefit is significant.		
	Is the structure being utilized as a "private deck" when ski shows are not occurring?		
Riparian Impact	Are the structures located outside the "applicant's" riparian zone of influence?) Or, Are riparian approvals (signatures) adjacent to the defined performance area absent? Neighbor sign-off in for a described boat traffic pattern within 200' of the shore.		
	Are there specific objections from neighbors that detail how the ski jump/performance platform, and associated uses interferes (ie. hours of operation, etc.) with other riparians?		

Comments on the proposed/existing Water Ski Jump/Platform.

[illegible]



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of Don Anderson for a Permit to Place
a Structure (88 Slip Marina) on the Bed of Lake
Wisconsin, Town of Lodi, Columbia County,
Wisconsin

Case No. 3-SC-99-4013LW

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Don Anderson, 5856 Easy Street, Waunakee, Wisconsin, 53597, filed an amended application on July 9, 2001 with the Department of Natural Resources for a permit to place four piers on the bed of Lake Wisconsin. The proposed piers are from 68 to 72 feet long and would accommodate up to 88 slips. The proposed project is located in the SW $\frac{1}{4}$, SW $\frac{1}{4}$, Section 8, Township 10 North, Range 8 East, Town of Lodi, Columbia County, Wisconsin.

On June 7, 1999, the Department of Natural Resources denied a previous permit application. The Division of Hearings and Appeals received a Request for Hearing from the Department on October 27, 2000. A hearing date was set and then adjourned to allow the applicant time to revise his plan. A revised plan was submitted on July 9, 2001.

Pursuant to due notice hearing was held on September 26 and 27, 2001, at Lodi, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. The parties requested an opportunity to submit written closing arguments and the last was received on October 9, 2001.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

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FINDINGS OF FACT

1. Don Anderson, 5856 Easy Street, Waunakee, Wisconsin, 53597, filed an amended application on July 6, 2001 with the Department of Natural Resources (DNR) for a permit to place four piers on the bed of Lake Wisconsin. The proposed piers are from 68 to 72 feet long and would accommodate up to 88 slips.
2. The applicant owns riparian property located in the SW 1/4, SW 1/4, section 8, Township 10 North, Range 8 East, Town of Lodi, Columbia County, Wisconsin.
3. The applicant proposes to construct a marina at the above-described site that would accommodate 88 boats. The applicant owns a three-acre, triangle-shaped, parcel which consists mostly of wetlands. The parcel also includes a 25-foot wide strip (also consisting mostly of

wetlands) that runs south along a railroad corridor. The parcel abuts Lake Wisconsin in the Town of Lodi. Nearly the entire stretch of riparian frontage except the extreme north end consists of wetlands. The upland area is proximate to an existing bar/restaurant which is not part of the applicant's property. Approximately 1500 feet of frontage is proximate to Lake Wisconsin, although the record is unclear as to how much of this is "riparian property" due to erosion along the bank. The upland property at the site totals approximately .72 acres. This consists of .58 acres on parcel A and .14 acres along the railroad corridor. (Ex. 32)

4. The proposal seeks to concentrate the pier slips in a single area, close to the developed area next to an existing bar/restaurant. The neighboring bar for many years supported a local water-ski show and habitat in that area is considerably degraded. Most of the Anderson parcel includes high-quality wetland habitat. The pier complex would extend approximately 360 feet laterally along the shore. The piers would extend up to 180 feet from the current water-shore line, and up to 210 feet below the ordinary highwater mark. (OHWM) No boats would be moored in the first approximately 50 feet below the existing water line, which is at or about the three feet water-depth. Instead, the four piers would be attached to a T-shaped frame in an effort to allow light penetration in the first fifty feet of the near shore area. There would be one 72-foot long pier, one 70-foot long pier and two 68-foot long piers. Each pier would moor approximately 22 boats. The piers extend well into the waters of the bay, to the 74-inch water depth. No jet skis would be allowed at the marina. Instead, the applicant expects to moor primarily pontoon boats.

5. The total footprint of the marina complex would occupy nearly 2 acres of the public waters of Lake Wisconsin. This is an area which would be largely denied to the public to fish, boat or otherwise make use of public waters. The applicant would allow public fishing from piers and would provide some public benefit by providing mooring opportunities. However, any public benefit is limited in this case because the lake already exceeds maximum public access criteria as set forth in Wis. Admin. Code NR 1.91(5). (Larson) DNR Fisheries Biologist Tim Larson testified that the public boat access criteria are not binding on the instant private marina permit application. However, the administrative code presumes that, when maximum public boating access numbers are exceeded, provision of further access "materially impairs navigation and is detrimental to the public interest." (Id.) Accordingly, the instant private marina does not provide a significant public benefit by providing mooring slips to the public.

6. The proposed piers would materially obstruct navigation in Okee Bay. DNR Warden Steven Schlimgen testified that the proposed piers would extend much farther out into the bay than other piers in the area and would pose a safety hazard, both during boating season and in the winter. There is substantial boating activity within Okee Bay, including water skiing and recreational boating by large fast boats. (Schlimgen; Exs. 18, 66) The proposed piers would extend 130 feet farther out in the waters of the bay than the currently existing piers. (Id.) Schlimgen was persuasive that any piers extending more than 100 feet from the existing shoreline would pose a hazard or unduly restrict boating in the bay.

7. There is aquatic vegetation in the areas in and around the proposed pier. The DNR conducted a field investigation in July, 2000, and found abundant sago and curly leaf pondweed, as well as seven other aquatic plant species that provide significant habitat value to fish and

waterfowl. (Ex. 14) The applicant's experts conducted field investigations much later in the season, and found much more sparse aquatic vegetation. Ms. Thompson sampled transects on September 20, 2001. (Ex. 7) Mr. Miller on September 21, 2001. However, such variability is not unexpected, especially given the life cycle of sago pondweed. (Sessing) The DNR was persuasive that the roughly two acre foot print of the proposed piers would have an adverse impact on the rich aquatic plant community and associated invertebrates due to shading by the large piers. (Larson, Marshall, Sessing) Further, the boat traffic related to use of the marina, even if mostly pontoon boats, would have a detrimental impact upon aquatic plants by cutting plants and increasing water turbidity. (Id.) Pontoon boats will have a greater tendency to shade out aquatic plants.

The applicant has not carried his burden of proof in demonstrating that there will not be detrimental impacts to aquatic plant communities.

8. The parcel is at the edge of a DNR designated "sensitive area" but is not included on the final sensitive area map. (Ex. 63) DNR Water Resources Specialist Mark Sessing testified that the Anderson parcel was left off the 1992 map by error, and that the parcel will be included on future maps. (Ex. 61) The sensitive area determination primarily relates to restrictions on use of chemicals on aquatic plants. However, there is no question that both the wetland vegetation above the OHWM and the lakebed aquatic plant communities in the area where the proposed piers would be placed provide a rich habitat for wildlife and fish. Sago and long leaf pondweed, and white water lily all provide waterfowl food and fish food and cover. (Ex. 14) The "macrophyte population of the Okee Bay" area has been identified as an "outstanding feature" of Lake Wisconsin in connection with Federal Energy Regulatory Commission (FERC) licensing matters. (Ex. 20) In the 1980's, well prior to Mr. Anderson's purchase of the property, the DNR considered developing the Anderson parcel as a public access site boat launch site. The DNR determined that the site was not appropriate for development because of potential impacts to wetlands. (Larson; Ex. 72) The record supports treating the Anderson parcel as contiguous to a unique and "sensitive area" of Lake Wisconsin.

9. The DNR has issued a guidance document relating to marinas and similar mooring facilities. (Ex. 2) The guidance provides that the reasonable use of a riparian parcel has a direct relationship with the amount of riparian frontage owned. The guidance provides that a threshold calculation allows for two berths for the first 50 feet of frontage and one for each additional feet of shoreline in common ownership.

The total expanse of this parcel is 1500 feet, although parts of the 25-foot strip have been subject to erosion and there may no longer be any riparian property above the ordinary high-water mark in those areas. Further, the fact that so much of the parcel is high quality wetland must be taken into account when considering the reasonable use of this parcel. (Biersach) Finally, the aquatic habitat is unusually rich in much of the near shore area of the Anderson parcel. This argues for a lesser number than the "threshold" reasonable use calculation of 30 or 31 slips. The DNR Aquatic Habitat Expert Pam Biersach, presented testimony that the reasonable use of the 1,500 feet of frontage would be one pier and two slips based on her belief that the 1,500 feet of frontage was part of only five- percent sensitive area left in the lake. Ms. Biersach's testimony assumed that this wetland parcel should be considered a "sensitive area" of

Lake Wisconsin.

The applicant offered testimony that marinas are afforded more than the basic calculation because they provide public access. (Ex. 2) This is, as general statement, true. However, in this case there was testimony that the lake already exceeds maximum public access criteria. (Larson) Accordingly, the value of increased public access is very limited. Further, the proposal has significant impacts to other public rights in navigable waters identified in the Marina Guidance cited by the applicant. (Ex. 2)

Balancing all of these factors, the reasonable use of this parcel would be seven or eight boat slips. Because there is no proposal before the Division limited to this number of slips, it would not be appropriate to issue such a permit in connection with the Order set forth below. However, the record would support issuance of a permit for eight slips and one pier if a proposal addresses the following unresolved issues:

- a. Placement of one pier and no more than 8 slips within 100 feet of the OHWM;
- b. Provision for a stormwater retention pond with an appropriate buffer from wetland areas;
- c. Placement of a parking lot to accommodate 4 cars on an upland portion of the parcel;
- d. Compliance with county parking lot size requirements;
- e. Access to the pier shall be from an upland portion of the parcel or by a boardwalk over wetlands at the north end of the parcel if there is not sufficient available upland.

10. The proposed project would have detrimental impacts on wetland functional values. The applicant proposes a boardwalk roughly at the center of parcel A. (Exs. 4 and 32) The applicant's own wetland expert, Alice Thompson, opined that she would prefer to see the boardwalk closer to the upland area at the northern property line to limit impacts to wetlands. The applicant proposes a parking lot large enough to serve 44 cars, or half of available boat slips. (Anderson) There is likely to be a significant detrimental impact to wetland vegetation as a result of runoff from either a paved or gravel parking lot. (Trochell) A stormwater retention pond would likely mitigate direct impacts to wetlands. (Thompson, Trochell) However, given the small amount of available upland, it would be difficult to locate both the parking lot and a pond on the site. (Trochell) There are practicable alternatives available which would have less impact on wetlands, including developing the lot for a residence. (Trochell)

11. The proposed large marina complex would have detrimental direct and cumulative impacts on maintaining fishery values in Okee Bay. (Larson) DNR Fisheries Biologist Tim Larson provided largely unrebutted testimony describing in great detail negative impacts to fishery associated with large pier structures placed in good quality fish habitat. (See: Exs. 75-

83) Further, the DNR twice sampled fish populations in the immediate area of the proposed piers. On July 7, 2000, the DNR identified nine fish species in the waters at the site. The DNR also found a Special Concern fish, the pugnose minnow, when surveying in June of 1999. Developing this site would undermine fisheries reproduction, nursery habitat and overall fish production in a lake with limited littoral zone habitat due to cumulative effects of development elsewhere on the lake and poor light penetration for aquatic plants. (Larson, Marshall; Ex. 14)

While fish can be attracted to shaded areas associated with piers, this fact is misleading for at least two reasons. First, the same shading which attracts adult fish may inhibit plant growth necessary for both spawning (Ex. 83) and cover and nursery for immature fish. Further, Larson testified that recent studies have concluded that developed areas that include large pier structures have been associated with a significant decline in fish species diversity. (Ex. 76) The scientific literature also indicates that environmental impacts to fish populations associated with pier construction are particularly detrimental when placed in “sensitive” habitat areas. (Ex. 85)

The applicant has not carried his burden of proof in demonstrating that the proposed project will not have a detrimental impact upon the public interest in maintaining fishery values.

12. The area of Okee Bay that includes the Anderson parcel provides significant habitat to a wide variety of reptiles and amphibians, quadrupeds, waterfowl and migratory birds. (Kaiser; Exs. 23 and 54) The 360-foot length of the pier to some extent creates a structural barrier that deters use by wild mallards and other migratory waterfowl. (Kaiser; Ex. 54) Kaiser opined that the marina project would likely result in a decrease use by waterfowl of the area including the proposed marina. (Id.) Direct impacts to wildlife would be relatively minimal. (Miller; Kaiser) However, the cumulative impact of destroying remaining good quality wildlife habitat on Lake Wisconsin is significant. (Kaiser) The direct impacts to wildlife are not sufficient in themselves to result in denial of the permit. However, the applicant has not carried his burden of proving that there would not be cumulative impacts to wildlife due to the loss of two acres of wildlife habitat.

13. The proposed marina project would have some detrimental impact on natural scenic beauty. There is no question the four large piers would detract from the natural beauty of the area. However, this is not in itself a sufficient basis to deny the permit application. The area immediately next to the area of the proposed piers has been used as a commercial property for many years and supported the water-ski show. The applicant has made an effort to concentrate the proposed piers in the two acres near this area of the shoreline.

14. The testimony of Town of Lodi Chairperson Charlaire Brereton, indicates that the size of parking lot proposed by the applicant is insufficient to meet the size requirements of county ordinances relative to parking facilities. (See Ex. 87) This further exacerbates the problems outlined above relative to the small amount of upland available for all of these marina-related facilities.

15. The applicant is financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

16. The existing structures will not reduce the effective flood flow capacity of Lake Wisconsin.

17. The proposed structures will adversely affect water quality but will not significantly increase water pollution in Lake Wisconsin. The structure will cause some minimal environmental pollution as defined in Wis. Stat. § 218.01(10). The increased boat traffic associated with the mooring of 88 boats is likely to increase turbidity by raising sediments from the lake bottom. (Marshall; Ex. 54) However, impacts to water quality are not a sufficient basis in themselves to result in denial of the permit.

18. The Department of Natural Resources has complied with the procedural requirements of Wis. Stat. § 1.11 and Wis. Admin. Code chapter NR 150 regarding assessment of environmental impact.

DISCUSSION

The applicant owns and operates another marina on Lake Wisconsin, Moon Valley. He believes there is a demand for pier slips in the Okee Bay area in the Town of Lodi, because access there is more convenient for boaters from Dane County. Based upon the record at hearing, there is every reason to believe Mr. Anderson is capable of operating a marina in an efficient and environmentally responsible manner. However, this primarily wetland parcel is not adequate to allow for a project on the scale that Mr. Anderson believes is necessary to be financially viable. Anderson testified that anything less than 60 slips would not make financial sense. At best, this parcel could support a “mini-marina” of 7 or 8 slips, especially given the county ordinance relating to size requirements for parking lots, (Ex. 87) and the need for stormwater retention pond as the applicant’s own wetland expert conceded would be required. (Thompson)

The proposed project is far too large for this wetland dominated riparian parcel. There was no showing by a greater weight of the credible evidence of exactly how much riparian frontage the applicant owns. Much of the parcel consists of a 25 foot buffer strip between a rail corridor and the lake. Significant erosion has occurred in some areas, leaving a serious question of whether all of the property remains “riparian.” The “reasonable use” of a riparian parcel is based in part on the environmental “value” of the subject parcel. *Sterlingworth v. DNR*, 205 Wis. 2d 702, 732, 556 N.W.2d 791 (Wis. Ct. App. 1996) The proposed project area constitutes an important community of aquatic plants and provides significant fish and wildlife habitat. Further, the reasonable use calculation is not a strict mathematical formula. Wetland parcels have limited uses and greater habitat value, and should be viewed differently than upland parcels.

More fundamentally, only five percent of high-quality aquatic vegetation and habitat remain on Lake Wisconsin. Much of what is left is in Okee Bay. The fundamental objection of the DNR to this dockage proposal is the potential effect on aquatic plant life as well as secondary impacts on wetland functional values. There is no question that a project on this scale would have significant adverse impacts upon both lakebed weed banks and wetland functional values. (Biersach, Sessing, et al) The applicant did not submit a “practicable alternatives” analysis, as

would be required to find the project in compliance with water quality standards for wetlands found in Wis. Admin. Code NR 103. In fairness, the DNR did not ask him to present one. This rich and beautiful area of Okee Bay provides outstanding habitat to fish and wildlife. Such areas are rare on Lake Wisconsin, and the DNR appropriately has sought to “preserve and protect” it. See: *Sterlingworth*, p. 722. Placement of piers in the area should be limited as set forth above, and only if and when the conditions described herein are met.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under Wis. Stat. §§ 30.12 and 227.43(1)(b) and in accordance with the foregoing Findings of Fact, to issue or deny a permit for placement of structures on navigable waters.

2. The piers described in the Findings of Fact constitute structures within the meaning of Wis. Stat. § 30.12.

3. The applicant is a riparian owner within the meaning of Wis. Stat. § 30.12. The applicant has not carried his burden of proving the exact amount of riparian frontage owned.

4. The applicant for a Wis. Stat. § ch. 30 permit has the burden of proof that the project will meet the standards in Wis. Stat. § 30.12(2), *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987). The applicant has not carried his burden of showing that the proposed project would not be detrimental to the public interest in navigable waters.

5. The placement of four large piers totaling 88 pier slips in this area would not be a “reasonable use” of this wetland-dominated riparian parcel. *Sterlingworth*, at p. 718. Placement of one pier less than 100 feet in total length and mooring no more than eight slips would be the maximum “reasonable use” of this riparian property.

6. The DNR and the Division must consider the cumulative impacts of permitting structures under Wis. Stat. § ch. 30. *Hixon v. Public Service Commission*, 22 Wis. 2d 608, 619, 146 N.W.2d 577 (1966) and *Sterlingworth v. DNR*, 205 Wis. 2d 710, 556 N.W.2d 791, (Wis. Ct. App. 1996). There would be detrimental cumulative impacts from placing numerous piers in areas which provides significant aquatic habitat.

7. The applicant has not carried his burden of proof in showing that the proposed project would not be “detrimental to the public interest in navigable waters” within the meaning of Wis. Stat. § 30.12(2).

8. The public trust doctrine protects the public interest in navigable waters, including the interest in maintaining a high-quality fishery for recreational purposes. *Muench v. PSC*, 261 Wis. 492, 501-502, 53 N.W.2d 514 (1952). The public trust duty requires the state not only to promote navigation but also to protect and preserve its waters for fishing, recreation and scenic beauty. *Just v. Marinette Co.*, 56 Wis. 2d 7 (1972).

9. The project is a type III action under Wis. Admin. Code § NR 150.03(8)(f)4. Type III actions do not require the preparation of a formal environmental impact assessment.

ORDER

WHEREFORE, the request for a permit to place structures on the bed of Lake Wisconsin is DENIED.

IT IS FURTHER ORDERED, that if the applicant files a request for a permit which meets the conditions set forth in Finding #9 above, limited to one pier and no more than eight slips, the DNR shall issue such a permit without need for a second contested case proceeding.

Dated at Madison, Wisconsin on November 7, 2001.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By

JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30)

days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.

DATE: January 27, 2003

Insert: CHAPTER 75
Waterway and Wetland Handbook

TO: Water Management Specialists
Water Management Engineers
Regional Aquatic Habitat Experts
Bureau of Fisheries Management and Habitat
Protection – Rivers and Habitat Protection Section

SUBJECT: **Guidance for Reviewing “Dockominium” Projects**

This document is intended solely as guidance, and does not contain any mandatory requirements except where requirements found in statute or administrative rule apply. This guidance does not establish or affect legal rights or obligations, and is not finally determinative of any of the issues addressed. This guidance does not create any rights enforceable by any party in litigation with the State of Wisconsin or the Department of Natural Resources. Any regulatory decision made by the Department of Natural Resources in any matter addressed by this guidance will be made by applying the governing statutes and administrative rules to the relevant facts.

Summary of Guidance

The purpose of this guidance is to assist staff in interpreting and applying the findings of the recent Wisconsin Supreme Court decision in ABKA Limited Partnership v. Wisconsin Department of Natural Resources, 2002 WI 106. In general, staff should first review the proposal for fundamental habitat and public rights impacts and make a reasonable use determination, then notify the applicant of the determination. Cases of non-residential condominiums involving boat slips should be referred to the FH Bureau for review.

Background

The Wisconsin Supreme Court found that the Abbey Harbor Condominium’s lock box units did not have an independent use as required under state condominium law, and therefore were not valid condominium units. In so deciding, the court noted that the condominium declaration did not state any independent purpose for which the lock box units were intended. The court further stated that a condominium unit “cannot serve primarily as a conduit for another use.” Because the lock boxes were not valid condominium units, the court concluded that the Abbey Harbor Condominium’s declaration providing a boat slip as an appurtenance to each unit is an attempt to convey riparian rights in violation of 30.133, Wis. Stats.

The Court went on to state:

We note that residential condominium units that provide for the use of boat slips are readily distinguishable from ABKA’s lock boxes. Residential condominium units are intended for a type of independent use.... Such units would comply with the statutory definition of “unit,” would allow for a valid condominium conveyance, and would create common interest ownership in riparian property. Therefore, residential units that provide for the use of a boat slip would not contravene s. 30.133.

Considerations



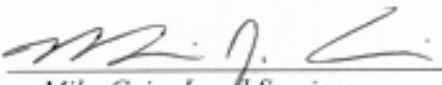
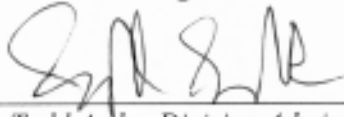
Based on the Supreme Court ruling, we can conclude that existing or proposed residential condominiums that provide boat slips for unit owners will generally be a lawful means of conveying riparian rights. Of course they must meet all applicable statute, code and common law requirements, and the number of boat slips must be limited to a reasonable use.

For non-residential condominiums, the Supreme Court recited the following principles:

- The condominium declaration must describe the purpose of the units apart from their appurtenant boat slip.
- To be valid, condominium units must have an independent use and value. For example, condominium form of ownership has been applied to airplane hangars and grain storage bins, which are independent uses.
- The unit must not simply be a conduit for another use, e.g. the use of the boat slip.

For any non-residential condominiums that provide or propose to provide boat slips to unit owners, refer the case to the FH Bureau with a copy of the condominium declaration, application and pertinent information to describe the proposed project. Bureau and Legal staff will review non-residential condominium proposals for compliance with all applicable laws, and advise regional staff how to proceed.

Drafted by Liesa Nesta

Approved: 	on <u>4-21-03</u>
<i>Mary Ellen Vollbrecht, Section Chief</i>	<i>Date</i>
Approved: 	on <u>4-21-03</u>
<i>Michael Staggs, Bureau Director</i>	<i>Date</i>
Approved: 	on <u>4/23/03</u>
<i>Mike Cain, Legal Services</i>	<i>Date</i>
Approved: 	on <u>4/23/03</u>
<i>Todd Ambs, Division Administrator</i>	<i>Date</i>